

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SPECTRUM JUVENILE JUSTICE SERVICES

and

Case 07-CA-155494

TAMIKA KELLEY, an Individual

and

07-CA-160938

COUNCIL 25, MICHIGAN AMERICAN  
FEDERATION OF STATE, COUNTY, AND  
MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO

and

07-CA-174758

INTERNATIONAL UNION, SECURITY, POLICE  
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

and

07-CA-175342

LOCAL 120, INTERNATIONAL UNION,  
SECURITY, POLICE AND FIRE  
PROFESSIONALS OF AMERICA  
(SPFPA)

*Donna M. Nixon, Esq.* and  
*Eric Cockrell, Esq.*,  
for the General Counsel.  
*Sheryl A. Laughren, Esq.*,  
for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Detroit, Michigan, on March 27 - 30, 2017. Upon charges filed by Charging Parties Tamika Kelley,<sup>1</sup>

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<sup>1</sup> Kelley filed a charge on July 7, 2015, and amended charges on August 28, September 29, October 30, 2015, and May 10, 2016.

AFSCME,<sup>2</sup> SPFPA,<sup>3</sup> and SPFPA Local 120,<sup>4</sup> the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (complaint) in this matter on August 31, 2016.<sup>5</sup>

The complaint alleges that Spectrum Juvenile Justice Services (the Respondent) committed violations of: Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) by eliminating the breaks between scheduled and “mandated” shifts and by requiring contingent employees to work additional mandated shifts; Section 8(a)(5) by, as a result of requiring contingent employees to work mandated shifts, discharging employee Quiana Jenkins and other unknown employees, and failing to provide Charging Party SPFPA information it requested that was relevant to its duties as the collective-bargaining representative of the employees; Section 8(a)(3) and (1) by issuing a written disciplines to Charging Party Kelley; Section 8(a)(1) by suspending Kelley and employees Sherman Cochran and Delaine Singleton-Green, and discharging employees Alfred Nealy and Lamont Simpson for their protected concerted activities, and by unlawfully interrogating employees, conducting surveillance of employees’ protected activities, creating the impression of surveillance, threatening the discharge of employees for engaging in protected activities, and coercively informing employees they could no longer take breaks between scheduled and mandated shifts because they voted for the union.<sup>6</sup> The Respondent, in its answer, denied that it violated the Act as alleged.

On the entire record,<sup>7</sup> including my observation of the demeanor of the witnesses,<sup>8</sup> and after considering the briefs filed by the General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a corporation with facilities at 330 Glendale (Calumet facility) and 1961 Lincoln (Lincoln facility) in Highland Park, Michigan (collectively Highland Park facilities), has been engaged in the operation of a maximum security juvenile detention center. The Respondent admits by stipulation of the parties, and I so find, that in conducting its business operations

<sup>2</sup> AFSCME filed a charge on September 28, 2015, and an amended charge on October 23, 2015.

<sup>3</sup> SPFPA filed a charge on April 22, 2016.

<sup>4</sup> SPFPA Local 120 filed a charge on April 29, 2016, and amended charges on June 6, 2016, July 28, 2016, and August 30, 2016.

<sup>5</sup> All dates are 2016, unless otherwise indicated.

<sup>6</sup> Prior to the trial the parties settled the allegations in complaint paragraph 9, which alleged that the Respondent unlawfully maintained certain rules or policies. (Tr. 11, Jt. Exh. 8) The General Counsel’s motion at trial to sever and withdraw paragraph 9 from the complaint was therefore granted.

<sup>7</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; “Jt. Exh.” for Joint Exhibit; “GC Br.” for the General Counsel’s brief; and “R. Br.” for Respondent’s brief.

<sup>8</sup> In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

described above, during the calendar year ending December 31, 2015, it purchased and received at its Highland Park facilities goods valued in excess of \$50,000 directly from points outside the State of Michigan. (Jt. Exh. 1)

It is also admitted, and I so find, that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Charging Party Unions AFSCME, SPFPA, and SPFPA Local 120, have been labor organizations within the meaning of Section 2(5) of the Act. (Jt. Exh.1.)

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Alleged Violations of Section 8(a)(1) of the Act*

#### 1. Background

The Respondent's Calumet and Lincoln facilities located in Highland Park, Michigan, are maximum security treatment facilities for all-male juvenile prisoners or residents who have been adjudicated by the courts and criminal justice system to complete treatment programs. (Tr. 69.) The two facilities are adjacent to each other on the Highland Park campus and approximately 50 to 80 yards apart. The facilities are operated by executive director, Melissa Fernandez. She reports to Roger Swaninger, the chief executive officer and president of Spectrum Human Services, Respondent's parent company. Fernandez has an office at the Lincoln facility, but not at the Calumet facility, and she has mailboxes at both facilities. The Respondent's management personnel also include managers and supervisors who operate from the respective "intake areas" where the residents enter the facilities. (Tr. 97.)

The Respondent's facilities operate on three shifts: a day shift from 6 a.m. – 2 p.m.; an afternoon shift from 2 p.m. – 10 p.m.; and a night shift from 10 p.m. – 6 a.m. (Tr. 96–97) The Respondent's personnel at both facilities consist of youth workers (also, known as youth specialists), security guards, teachers, therapists, support staff, secretaries, and kitchen staff. (Tr. 69.) There are approximately 60 youth workers at each facility. (Tr. 585.) The youth workers engage the residents in their treatment standards, and help them with their homework and their daily routines which include their hygiene, school issues, homework, and treatment. (Tr. 69.) The therapeutic treatments administered to the residents are 12-month programs consisting of seven stages. (Tr. 69.) The Youth Workers participate in group activities and social living skill groups with the residents. (Tr. 70–71.)

The youth workers are responsible for the daily supervision and oversight of the residents who are housed in sections or areas referred to as "pods." The Calumet facility has 11 pods and the Lincoln facility contains 10 pods. (Tr. 241.) The pods contain 10 cells (resident living quarters), a control room, a classroom, a therapist office, and a room where residents may engage in activities such as watching television, communing with each other, or playing video or board games. The pod control rooms serve as offices within each pod and they contain resident lockers, a closet where cleaning supplies are stored, and various types of paperwork pertaining to the residents. Some pods share the same control room, but all pods are separated by electronic locks. (Tr. 547.) Despite the fact that some of the residents' items (such as clothing) are stored in the control rooms, the control rooms are off-limits to the residents. If a youth worker is

required to enter the control room to get something for a resident, the other youth worker on that shift will watch the residents while the other retrieves the item. (Tr. 75.) Clarence Atwater, a youth worker and current employee, testified that youth workers are not required to call a supervisor when items need to be retrieved from the control room. (Tr. 75.)

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In order to facilitate communication among the Respondent's staff while working in the pods, supervisors, managers, security officers, and youth workers are assigned radios. The youth workers are with the residents all the time and are not provided breaks during their shifts. However, they can call on their radios to request relief if it is required, and if they have to use the restroom, they can use the radio to get coverage by another youth worker. (Tr. 577-579) The ratio of youth workers to residents is set forth in Rule 4127 of the Respondent's Policy and Procedure Book, part 1, page 51, which provides that the staff-to-resident ratio is no less than 1 worker to 10 residents during normal hours of work, and no less than 1 worker to 11 residents during sleeping hours, and violations for ratios of workers to residents could subject the Respondent to State penalties. (Tr. 639-641) The youth workers are required to keep a "line of sight," a process by which they keep all residents in front of them and in sight so they know where the residents are at all times. (Tr. 75.)

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2. In June and July 2015, the employees submitted protected concerted complaints to the Respondent concerning their terms and conditions of employment that were not addressed or resolved

In June or July 2015, morale among employees was low. (Tr. 77, 114-115, 184-187, 248-249, 317.) At that time, residents with mental health issues were being sent to the Respondent's facilities. Those residents were more challenging for the employees than their usual residents, and the youth workers believed they did not possess the appropriate training to deal with such mental health issues. (Tr. 77, 249.) As a result, a youth worker was assaulted and injured by a resident with mental health issues and youth workers were subjected to mental abuse by residents. (Tr. 77, 248.) In addition, at that time mandatory overtime for youth workers (a policy referred to as "mandation") was increased by the Respondent, and such mandatory overtime caused conflicts for employees who had to attend other jobs or pick up their children after their regular shifts ended. (Tr. 77-79, 153.) The employees also felt overworked and believed they were working too much mandated overtime. (Tr. 473-474.) These concerns over working conditions were discussed by employees, including Atwater, Lamont Simpson, and Raphael McQueen. (Tr. 115-116.) Employees also met with Respondent's management officials to explain the workplace issues they were experiencing, but the Respondent failed to address or resolve any of those issues. (Tr. 79, 249-250.)

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3. On or about July 2, 2015, the employees submitted protected concerted written complaints and concerns in the form of anonymous "petitions" to the Respondent's management and supervisory officials

In or around June 2015, several employees drafted petitions regarding their work issues and concerns that arose from their concerted discussions, and anonymously submitted them to management. (Tr. 79, 249-250.) Youth Worker Lamont Simpson, who worked at the Calumet facility, testified that in late June or early July, 2015, he spoke to fellow youth workers Raphael McQueen and Clarence Atwater about their shared workplace concerns, and he drafted a petition

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regarding those concerns and complaints. (Tr. 80, 105, 116-117) The "Calumet petition," which did not contain any employees' names, stated as follows:

5 We, the staff here at Calumet Center, are coming together as a collected front to inform administration that we have become very unhappy and concerned about working here at Calumet Center.

10 Our major focus and concerns are as follows: (1) Pay—We feel we are unpaid for the duties and required tasks that we are expected to deal with every day; (2) Client Intake—The facility is now accepting clients with documented mental challenges into the facility that already houses clients with criminal backgrounds and records; (3) Training—Currently the staff is not trained to deal with mentally challenged clients with the respect of handling their needs and situations that require mental health skills; (4) Staffing—The Center is already understaffed and being mandated to work overtime hours. Now with more clients, the need for staffing is a problem and the need for employees to work over their scheduled shifts is becoming a necessity; (5) Impact on Everyday Life—The above concerns and changes are affecting the lives of the staff and causing a great impact on family, daycare, economical status and health; (6) Moral [sic]—There is an enormous decrease in employee moral [sic] due to the lack of policy, procedure and administration support. We all feel as though supervision does not support us or have our back on issues that favor the employees.

25 We, the staff of Calumet Center, feel though we work hard, we do what is expected of us, keep order in our pods and sometimes go over and beyond the call of duty. We already on an everyday basis deal with verbal, psychological and sometimes physical abuse from our clients. And now recently, emotional abuse from our superiors.

30 As a Youth Worker, are [sic] responsibilities include: Youth Worker, Teacher and Tutor, Part-time fill-in Fathers and Big Brothers, Part-time Therapist, Life Coach, Hygienist, and Assisting and Maintaining resident's needs that result in a positive outcome for the client.

35 We, the staff of Calumet Center, deserve to receive comparable pay for the type and amount of work required of us, to be recognized as employees with a purpose because without the staff, the center could not function and to feel supported by our supervisors.

We, the staff of Calumet Center, feel that these concerns are valid and only fair.

40 We, the staff of Calumet Center, deserve to receive comparable pay for the type and amount of work required of us, to be recognized as employees with a purpose because without the staff, the center could not function and to feel support by our supervisors. As a whole, the employees here are dedicated, hardworking and motivated to the mission of the center. As a whole, the employees are client driven and inspired to help the clients achieve favorable outcomes. As a whole, the employees respect the policies and procedures set forth to govern the working environment, but would like them to be enforced in a fair and consistent manner.

We, the staff of Calumet Center, feel that these concerns are valid and only fair. We, the staff of Calumet Center, would like the opportunity to address these issues and seek a possible resolution that would prove beneficial for all parties involved being employer, employee, and clients. (GC Exh. 2.)

On July 2, 2015, Simpson was allowed into to the Calumet facility office by Respondent Security Supervisor Damien Dix. Dix asked Simpson what he was doing, and Simpson responded that he needed access to do some tax paperwork. (Tr. 117-119) Simpson concealed the petition in the sleeve of his shirt, and when in the mail room he covertly placed copies of the petition in the mailboxes of a number of managers, including Executive Director Fernandez, Facility Managers Kirpheous Stewart and Leroy Sherrod, Calumet Shift Supervisor Steven Johnson, Calumet Facility Manager Christopher Wilson, and Supervisor Donald Farrell. (Tr. 118-119, 173-174; GC Exh. 2) Later that day, in the Calumet facility locker room, he gave a copy of the petition to McQueen and told him he placed it in the managers' mailboxes. (Tr. 120.) McQueen informed him that he would provide the Calumet petition to Charging Party Tamika Kelley, who worked at the Lincoln facility. (Tr. 120, 251.)

Kelley testified that she received the Calumet petition and prepared a similar petition concerning workplace concerns and complaints which she shared with employees at the Lincoln facility. (Tr. 252-253.) That "Lincoln petition" stated as follows:

We, the staff of Lincoln/Calumet Center are coming together as a collected front to inform administration that we have become unhappy, and concerned about working here at Lincoln/Calumet Center. We deserve to receive comparable pay for the type and amount of work required of us. We are coming forth with the demands of which: (1) To be treated fairly and have equal employment: Pay, Opportunities, Respect, (2) Being underpaid/over-worked: Youth Worker/Tutor/Mentor, Fill-in parents/big brothers, Counsel, Therapist, Hygenist, Maintenance/Janitor, Security, Assisting and maintaining chronic offenders, severe mentally challenged, trauma-based, and emotionally impaired clients; all with criminal backgrounds/records, meeting residents needs that result in a positive outcome for the sake of the client, (3) "Personal Leave" days back, (4) Worked time being rolled up/back, (5) Impact on our families, daycare, economical status, health, and safety, (6) Lack of policy, procedure, and administrative support, (7) Verbal, physical, psychological, and emotional abuse. (GC Exh. 7.)

A number of employees reviewed and signed a page attached to the Lincoln facility petition. (Tr. 186-188; 254; GC Exh. 7) Kelley testified that she placed a copy of that petition (without the page that included the employees' signatures) in the mailboxes of the Lincoln managers and supervisors, which included Fernandez, Lincoln Director Oliver Cooper, Lincoln Facility Manager Marlon Bradford, Manager George, Lincoln Shift Supervisor Kerwin Johnson, Lincoln Shift Supervisor Prince Fullerton, and Lincoln shift Supervisor Michael Caston. (Tr. 253-254; GC Exh. 7) Thus, the employees also anonymously submitted a list of workplace concerns and demands to management at the Lincoln facility.

4. On July 2, 2015, Human Resources Administrator James Wiser sent the employees' Calumet petition to Executive Director Melissa Fernandez and Vice President of Human Resources Donald Fields

Respondent Human Resources Administrator James Wiser testified that on July 2, 2015, he emailed a copy of the Calumet petition to Fernandez and Donald Fields, the Vice President of Human Relations. (Tr. 595-596, 598, 660-661, 787; GC Exh. 2; Jt Exh. 1.) Fernandez acknowledged that Wiser emailed the petition to her and to Fields. (Tr. 596.) Fernandez, despite testifying at trial that she did not provide the Calumet petition to anyone else, nevertheless admitted that she "may have" sent it to CEO Roger Swaniger. (Tr. 597-598) Regardless of whether she provided Swaniger with the employees' petition, it is undisputed that Respondent received and was aware of the employees' petition of workplace concerns and demands on July 2, 2015.<sup>9</sup>

Fernandez further admitted that she discussed the employees' Calumet petition with the human resources personnel and with her "management team," and she discussed the fact that the staff was unhappy. (Tr. 660-661) However, she did not meet with the employees regarding the petition. (Tr. 661.) There is also no evidence that Fernandez, nor another management official under her direction, made any attempts to address the employees concerning their workplace complaints and issues.

5. The Respondent, on July 3, 2015, by Calumet Security Supervisor Damon Dix, unlawfully interrogated employees regarding their engagement in protected concerted activities in violation of Section 8(a)(1) of the Act

*a. The facts*

Alfred Neely, a Calumet youth worker, spoke to Calumet Facility Manager Christopher Wilson and Shift Supervisor Steven Johnson<sup>10</sup> about the Calumet petition. (Tr. 322; GC Exh. 2) Neely testified that when he and Simpson were present with Supervisor Johnson and Manager Wilson on or about July 4 or 5, 2015, Simpson asked Johnson and Wilson to give the petition to Calumet Director Kirpheous Stewart and they agreed to give him a copy. (Tr. 322.) According to Neely, later that evening, Wilson came back and told him that he spoke to Stewart, and "they're not going to talk about shit," and that the employees "better be at work." (Tr. 323-324) In connection with this testimony, Wilson was not called to testify at the trial to contradict Neely's assertion, and Steven Johnson was called by Respondent to testify, but he never contradicted Neely's testimony that he (Neely) asked Johnson and Wilson to give the petition to Stewart. (Tr. 352-379.) Likewise, Kirpheous Stewart testified on behalf of the Respondent, but he failed to rebut the assertions by Neely, as conveyed by his manager and supervisor, that he or the Respondent would "... not talk about shit with [the employees]" and "they better be at work. . . ." (Tr. 323-324, 768-785.)

<sup>9</sup> The Respondent admitted in its answer to the complaint, that it received the employees' petition concerning working conditions about early July 2015. (GC Exh. 1(oo).)

<sup>10</sup> At the trial, Steven Johnson testified that the spelling of his first name is "Steven" and such spelling is accurately reflected by stipulation of the parties. (Jt. Exh. 1.) In the record, however, Steven Johnson's name is misspelled as "Stephen," which appears to be an inadvertent error.

On that same subject, Simpson testified that on July 3, 2015, approximately 2 hours after he left the petition in the mailboxes, he had a conversation with Calumet Security Supervisor Damien Dix, who entered the room in pod 3 and asked Simpson whether he knew anything about a “letter” that was put in the mailboxes of the management officials. (Tr. 121, 125, 825–826; GC Exh. 2.) While Dix testified on Respondent’s behalf, he failed to deny that he asked Simpson whether he knew anything about the letter/petition, and he failed to offer any legitimate explanation for his question. (Tr. 825-837.)

Simpson testified that after he denied any knowledge of the petition, Dix told him the managers and supervisors had a meeting in which they talked about the unsigned letter. Dix then told Simpson that Kirpheous Stewart stated: “they ain’t going to do shit,” and that Stewart “threw [the petition] away.” (Tr. 121.) With regard to Simpson’s assertion that Dix told him that Stewart wasn’t “going to do shit” about the employees’ concerns in their petition, at trial, Stewart failed to deny that he made that statement to Dix. However, Dix denied that he told Simpson that Respondent “wouldn’t do shit about the employees’ concerns,” and he also went so far as to deny that he was ever aware of the written complaints or petition submitted by the employees. (Tr. 829–831.)

*b. The credibility determinations*

While many of the facts of this case are uncontroverted, there are instances where the testimonies of the Respondent’s witnesses differ from the testimonies of the General Counsel’s witnesses. In such instances, as the finder of fact, I must determine the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

My observation during the trial was that the General Counsel’s witnesses were generally very credible and that they possessed sincere and truthful demeanors. They also generally testified in a consistent and straight forward manner that was worthy of belief. In addition, General Counsel’s witnesses Clarence Atwater, Sherman Cochran, and Tamika Kelley were current employees of the Respondent, and on that basis, I provide their testimonies additional weight as they offered testimony adverse to the interests of their current employer. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1, fn. 2 (2014); *PPG Aerospace Industries*, 353 NLRB 223 (2008); *Advocate South Suburban Hospital*,



346 NLRB 209, 209 fn. 1 (2006); *Flexsteel Industries*, 316 NLRB 745 (1995), *affd.* mem. 83 F.3d 419 (5th Cir. 1996). In particular, I found Simpson to be a very credible witness, as he appeared sincere and honest, and his testimony was convincing and consistent.

5 On the other hand, I find that, in general, Respondent's witnesses testified in a less convincing manner. Their testimonies were at times guarded and appeared insincere. Their testimonies were also unbelievable and implausible at times. In particular, Dix's demeanor was guarded, defensive, and appeared less than forthright. His testimony was also not credible because it was, at times, implausible. Dix's testimony that he was not aware of the employees' written complaints in the form of the petitions is not believable or plausible, considering the 10 undisputed fact that Fernandez was notified of the petition and provided a copy of it immediately after it was put in the managers' mailboxes. (Tr. 596.) In fact, Dix's testimony was contradicted by Fernandez, who testified that she was emailed the Calumet petition by Wiser on July 2, 2015, and he informed her it was in her mailbox. (Tr. 595-596; GC Exh. 2.) She also testified that she 15 informed her management team (which presumably would have included Dix, the Calumet security supervisor) that she received the Calumet petition and she discussed it with them, including the fact that the employees were "unhappy." (Tr. 660-661.) I therefore find it implausible and unbelievable that Dix did not have knowledge of the employees' written complaints, as he asserted. Thus, on those occasions where Dix's testimony differs from the 20 testimony of the General Counsel's witnesses, I fully credit the General Counsel's witnesses.

With regard to the facts of this complaint allegation, the Respondent argues that the interrogation never occurred because Dix was not even aware the petition had been given to management. Specifically, Respondent contends that the "anonymous letter" that was 25 discovered by Wiser in his mailbox on July 2, 2015 (GC Exh. 2.) "was never distributed to the facilities' supervisors nor was it discussed with them." (R. Br. p. 39.) This argument, however, is without merit and is clearly not supported by the record evidence. As mentioned above, Fernandez testified that she was given the petition by Wiser on July 2, 2015, and she informed her management team and supervisors that the petition was received, and she discussed the 30 petition and the fact that the employees were "unhappy," with management and supervision. (Tr. 660-661.)

In addition, the Respondent contends that the questioning never occurred because Simpson was not a credible witness and his assertions should not be believed. (R. Br. p. 40.) 35 Respondent bases this argument on its contention that Simpson was "clearly wrong, or lying, when he said that Dix buzzed him into the administration area when he surreptitiously distributed [the petition] at approximately 5:30 a.m. on July 2, 2015," because Dix testified that he "has never been in [that facility] at that time of the morning." (R. Br. p. 40.) This argument is likewise without merit, as I have found that Dix was not a credible or believable witness, and I 40 do not credit his assertion that he was never at the facility at 5:30 a.m. simply because it was before his shift started. In fact, the record established that Dix was not even sure which shift he was working that day, because when he was asked at trial if he knew what shift he was working on July 2, 2015, he answered: "I can't recall-off hand." (Tr. 827.)

45 Furthermore, even assuming Dix was not at the facility at 5:30 a.m. on July 3, 2015, I find that Simpson's assertion amounted to nothing more than a simple mistake as to the time he entered the facility to put the petition in the mailboxes. The fact that Simpson may have been

mistaken or incorrect about the time he delivered the petition, it does not mean it never happened, and it does not require that he be found an incredible witness. As I have found above, based on my careful examination of his demeanor, the context of his testimony at trial, and the inherent probabilities of the allegations, I found Simpson to be a very credible witness who appeared to provide truthful testimony about what happened with regard to this case.

Consistent with those credibility determinations, I find that Dix asked Simpson whether he knew anything about the petition/letter that was put in the mailboxes of management officials just several hours earlier, and that he told Simpson that Respondent wasn't "going to do shit" about the employees' concerns in their petition. Finally, on this topic, I find it important to note that while Dix testified on Respondent's behalf, after Simpson specifically asserted that Dix questioned him about petition, and Dix failed to rebut that assertion. (Tr. 825-837.)

*c. The positions of the parties*

The General Counsel alleges that Dix's questioning of Simpson about whether he knew anything about the employees' protected concerted complaints and demands about working conditions in the form of the petition/letter, was an unlawful interrogation of his sympathies to, or engagement in, protected activities under Section 7 of the Act. The Respondent, on the other hand, asserts that no violation of the Act occurred because even if Dix asked Simpson that question, it did not rise to the level of an "interrogation" because it did not contain any "threat of reprisal or force or promise of benefit." (R. Br. p. 40-42.)

*d. Analysis*

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights guaranteed in Section 7 of the Act. Section 7, the cornerstone of the Act, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Employees thus have a statutory right under Section 7 to act together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enfd.* 358 Fed.Appx. 783 (9th Cir. 2009).

The Supreme Court has held that "mutual aid or protection" concerns "the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Board defined concerted activity in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board clarified that definition of concerted activity in *Meyers II*, 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988), to include cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Id.* at 887. I find that in this case, the employees' submission of petitions to the Respondent setting

forth their complaints, concerns, and demands with regard to their terms and conditions of employment, clearly constituted concerted activity protected by Section 7 of the Act.

Despite the fact that the subject matter of the questioning concerned protected concerted activity, the Board has held that the interrogation of employees is not unlawful per se. *Emery Worldwide*, 309 NLRB 185, 186 (1992). With issues of employer interrogation of employees concerning their rights and activities protected by the Act, or their sympathies or support of such protected rights and activities, the Board determines “whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Scheid Electric*, 355 NLRB 160 (2010); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Intertape Polymer Corp.*, 360 NLRB 957 (2014), the Board noted that, based upon its decisions in *Phillips 66 (Sweeny Refinery)*, 360 NLRB 124, 128 (2014) and *Rossmore House*, supra, it considers the following factors in determining whether questioning an employee regarding their sympathies pertaining to protected concerted activity or union activity is unlawful: (1) whether there is a history of employer hostility to or discrimination against protected activity; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of the interrogation; and (5) the truthfulness of the employee’s reply.

Applying and balancing these factors, I find it inconceivable that the questioning of Simpson could be more coercive, as all of the factors strongly indicate a coercive interrogation. As an indicator of coerciveness, the evidence establishes Respondent’s hostility toward the protected complaints about employee working conditions as evidenced by Dix’s statement that the Respondent would “. . . not talk about shit with [the employees]” and “they better be at work. . . .” (Tr. 768–785.) The questioning also occurred at a time when the employees’ protected activity was in its infancy, as they had just started acting together to present petitions containing their concerns and demands to the Respondent regarding their conditions of work. The nature of the information sought reflects the coerciveness of the interrogation, as it concerned whether Simpson knew anything about the employees’ petition which attempted to better their work environment. It is important to note that Simpson was not yet open about his engagement in protected activities, as he covertly placed the anonymous petition in the managers’ mailboxes.

The identity of the questioner also reflects the coerciveness of the questioning as it came from one of Respondent’s relatively high ranking officials—the Calumet Security Supervisor. The Board has held that such interrogations from high-ranking employer officials weigh in favor of finding that the questioning was coercive. See *Matros Automated Electrical Construction Corp.*, 353 NLRB 569, 571 (2008), enfd. 366 Fed.Appx. 184 (2d Cir. 2010). The method and place of the interrogation is also evidence of its coerciveness, as Simpson had just 2 hours earlier covertly left the petition in the managers’ mailboxes, and the questioning took place in Simpson’s workstation as Dix sought him out and entered the room in pod 3 to ask him if he knew anything about the complaints about working conditions. Adding to the coerciveness of Dix’s interrogation was the fact that he informed Simpson that Respondent wasn’t “going to do shit” about the work concerns articulated in the petition, thus inferring that to engage in such protected concerted activity would fall on deaf ears and be fruitless. In addition, the fact that Simpson denied knowledge of the petition when asked by Dix, when in fact he was the moving

force behind providing it to the Respondent, serves as further evidence that he was so coerced and intimidated by the interrogation that he was reluctant to admit his involvement. The Board has found that such employee attempts to conceal support for protected concerted or union activities weigh in favor of finding an interrogation unlawful. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182 (2011); See, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), *affd.* mem. 121 Fed. Appx. 720 (9th Cir. 2005). Finally, while Dix testified at trial, he failed to deny that he questioned Simpson, and he failed to offer any legitimate explanation for the questioning. The Board has found that a respondent's failure to offer or articulate a legitimate explanation for its questioning of employees serves as further evidence of the coercive nature of the interrogation. *Sproule Construction Co.*, *supra* at 774 fn. 2.

Under these circumstances, I find that the question Dix directed to Simpson constituted an unlawful interrogation of his protected concerted activities, sympathies, and support, in violation of Section 8(a)(1) of the Act.

6. The Respondent, on July 5, 2015, by Calumet Shift Supervisor Cornelius Burton, unlawfully interrogated an employee regarding his engagement in protected concerted activities in violation of Section 8(a)(1) of the Act

*a. The facts*

Simpson testified that he and other employees, such as McQueen, discussed the fact that Stewart "balled up" the petition and threw it away, and that they felt management was not "taking them seriously," so they decided to picket or rally to get management's attention. (Tr. 123-124, 508-510) In doing so, many of the employees began calling-off the evening of July 5 for their shifts on July 6, stating that they were unable to work. (Tr. 357.) Calumet Facility Manager Steven Johnson received some of the phone calls and spoke with those employees. (Tr. 354-358) During the evening of July 5, Johnson sent emails to "the director," the facility managers, and supervisors who were scheduled to work on July 6 at 6 a.m. (Tr. 358-359) The Respondent's procedure for calling off work is for the employees to notify supervision by phone at least 3 hours before the beginning of the shifts, and as long as the employees have accrued leave time, no discipline is warranted. (R. Exh. 14, p. 37.)

At around 10:00 p.m. on July 5, Calumet Shift Supervisor Cornelius Burton called Simpson at home and asked him if he was part of the "rally" or picketing. (Tr. 124-125.) When Simpson denied knowing anything about it, Burton said, "come on, man, you know this is me; you don't have to be like that with me." (Tr. 124-125.) Simpson testified that Burton also told him: "It's getting crazy around here because people keep calling off left and right." (Tr. 125.) Simpson then called Calumet Supervisor Steven Johnson around 11 p.m. on July 5 and told him he would not be coming to work the following day. Burton was not called to testify at trial, and therefore Simpson's testimony on this matter was not disputed.

*b. The positions of the parties*

The General Counsel alleges that Burton's questioning of Simpson about whether he was going to take part in the protected concerted rally (picket), was an unlawful interrogation of his

sympathies to engage in protected activities under Section 7 of the Act. The Respondent denies that Burton's inquiry was unlawful.

*c. Analysis*

In determining whether the circumstances of the interrogation in this instance reasonably tended to restrain, coerce, or interfere with Simpson's rights under the Act, I find that applying the *Intertape Polymer Corp.*, supra, factors establishes that the questioning constituted a coercive interrogation that restrained and interfered with his protected rights under the Act. As mentioned above, the evidence of Respondent's hostility toward protected complaints from employees about their working conditions was apparent from Dix's statement that the Respondent would "... not talk about shit" with the employees, and the questioning occurred when the Respondent became aware that employees were calling-off work in order to picket or rally to bring their workplace concerns to the Respondent's attention. The nature of the information sought reflects the coerciveness of the interrogation, as it concerned whether Simpson was going to engage in protected concerted picketing activity.

With regard to the "identity of the questioner" factor, Burton was a shift supervisor to whom Simpson reported, and therefore the interrogation by him would reasonably be coercive. The method of the interrogation is also evidence of its coerciveness, as Burton's questioning of Simpson was clearly to solicit information from him concerning his involvement in the protected concerted activity. I note that if Burton was simply seeking to determine whether Simpson was going to be off work the next day, he could have just asked him that. Instead, he asked Simpson about his involvement in the protected concerted activity, which was clearly coercive. The Board has found such questioning coercive when it is used to elicit whether employees supported union or protected concerted activities. See, e.g., *Clinton Electronics Corp.*, 332 NLRB 479, 480 (2000). In addition, the fact that Simpson denied that he was going to be part of the picketing and tried to conceal his involvement, when in fact he was one of the employees who was an organizer of such protected activity, serves as further evidence that he was so intimidated by the interrogation that he was afraid to admit his involvement. See *Camaco Lorain Manufacturing Plant*, supra; *Sproule Construction Co.*, supra; *Grass Valley Grocery Outlet*, supra. Finally, I note that the Respondent never offered a legitimate explanation for the questioning, which serves as further evidence of its coerciveness. *Sproule Construction Co.*, supra at 774 fn. 2.

In asserting that Burton's questioning did not rise to the level of an unlawful interrogation, Respondent cites *Toma Metals, Inc.*, 342 NLRB 787, 788-789 (2004), in support. I find that case, however, is distinguishable from the facts of the instant case. In *Toma Metals*, the employer's manager, Hajko, asked employee Antal: "[W]hat's up with the rumor of the union I'm hearing?" The Board, contrary to the judge, found the questioning was not coercive. In that case, however, Hajko testified that he approached Antal because Antal was his wife's first cousin, and they had friendly relations and engaged in daily conversations. *Id.* at 789. In the instant case, there is no evidence that Simpson and Burton shared such familiar or friendly relations, or that they engaged in daily conversations. In *Toma Metals*, Antal did not hesitate to answer truthfully and did most of the talking during their conversation, whereas, in the instant case, Simpson did not answer truthfully and was reluctant to reveal his involvement in the protected conduct. *Id.* Furthermore, Hajko's questioning was broad and general and not focused on specific employees or specific protected activity, while in the instant case, the questioning

was specifically whether Simpson was part of the protected concerted picketing activity, and it specifically focused on his involvement. Finally, in that case the Board found the question itself told Antal that Hajko was attempting to verify what other sources had told him, and Hajko was not trying to ascertain Antal's views. Id. In the instant case, however, Burton was specifically  
 5 inquiring not only of Simpson's view, but whether he was going to be a part of, and participate in, the protected concerted activity, which was coercive. Thus, I find that *Toma Metals* is distinguishable from the instant case and the Respondent's reliance on it is misplaced.

Accordingly, I find that Burton's questioning of Simpson constituted an unlawful  
 10 interrogation of his sympathies for, and support of, the protected concerted activity, in violation of Section 8(a)(1) of the Act.

7. On July 6 and 7, 2015, the employees engaged in picketing at the Respondent's facility

On July 6, 2015, up to approximately 40 employees picketed the Respondent's facility by the parking lot area on Glendale Street, between Hamilton and Lincoln Streets. (Tr. 80-81) The picketing lasted from approximately 8:30 a.m. to 2 p.m. on July 6 and for only a few hours starting at 8:30 a.m. on July 7. (Tr. 80-84) Many of the employees (approximately 31) who engaged in picketing on July 6, 2015, called off of work that day within the required time before  
 20 the start of their shifts. (Tr. 84.) Simpson testified that he arrived early, around 5:15 a.m. and sat in his car on Glendale Street until the picketing began. Initially, around 7 to 10 employees were present at the picketing, but by around noon there were approximately 40 picketers. At around 1:45 p.m. the number of picketers started to decrease, and the picketing then ended around 2 p.m. (Tr. 128-129) The record reveals that employees carried signs that were poster size  
 25 (approximately 2 x 3 feet in size) and as they walked around, some chanting the phrases or wording found on their signs. (Tr. 129-130, 475-479; GC Exh. 4.) Those picket signs were made by Tamika Kelley and included, but were not limited to, phrases such as "equal opportunities, equal pay, equal respect;" "human resources working against us and not for employees;" "youth workers underpaid, overworked . . . save the kids;" and "verbal, physical,  
 30 psychological, emotional abuse." (Tr. 256-257; GC Exh. 4.)

Several employees testified that while picketing they saw management personnel within plain view as they were coming into the facility for work. Simpson testified that while picketing he saw several management personnel as they came into work, such as Fernandez, Cornelius  
 35 Burton, Donald Farrell, Damien Dix, Leroy Sherrod, and Childs. (Tr. 132-133) Kelley also testified that during the picketing, she saw Childs, Johnson, Cottingham, Dix, and Farrell drive by the picketers. (Tr. 257-258.) Employee Ruth Crosby testified that she saw managers drive by the picketers slowly (Tr. 479-482), and Neely testified that during the picketing he saw Fernandez, Stewart, Burton, Cottingham, and Dix, who were arriving at work, "watching the  
 40 picketing." (Tr. 327-328.) In addition, Calumet Youth Worker Raphael McQueen testified that while picketing, Supervisor Cottingham drove past them in his car and looked over at the picketers and smiled. (Tr. 518-519.)

On July 6, 2015, at 6 a.m., Calumet Facility Manager Christopher Wilson called  
 45 Executive Director Fernandez to notify her that a large number of employees had called off from reporting to work that morning. (Tr. 598-599, 661-686) Fernandez then called the Lincoln facility and confirmed that 31 employees had called off from work. (Tr. 599.) In response,

Fernandez, who lives approximately 1 hour from the Respondent's facilities, immediately dressed in her Spectrum polo-type shirt that the workers usually wore (because she knew she would have to perform the work of the youth workers) and she drove into work. (Tr. 599-601.) Fernandez testified that she left her residence between 7:15 and 7:30 a.m. in order to quickly reach the facilities so that she could immediately address what she described as a "staffing crisis," and which she considered to constitute an atypical operational occurrence. (Tr. 600-607, 661, 663.) Fernandez testified that she arrived at the facility around 8:30 a.m., entering on Glendale Street, but she did not see any employees engaged in picketing. (Tr. 601) Fernandez then set up a "command center" at the Calumet center in Kirpheous Stewart's office, and she started to notify the governmental "regulatory bodies." (Tr. 601-602) Stewart arrived at the facility around 9 a.m. and he called Facility Manager Johnson to the office where Johnson provided him a list of the staff working in the building. (Tr. 605.) At that time, Johnson had supervisors working in the pods, while Fernandez dealt with the business of running the organization short staffed. (Tr. 607.)

Facility Manager Steven Johnson testified that he worked the midnight shift on July 5, 2015, so he started work at 10 p.m. on July 5. According to Johnson, there were a lot of call-offs that night. He was successful in getting some people to come in, but there were not enough to cover the entire shift. (Tr. 358.) Johnson informed the morning facility managers and supervisors of the situation when they came in at 6 a.m. on July 6. (Tr. 358.) He met with Calumet Facility Managers Christopher Wilson and Leroy Sherrod and told them there were a lot of call-offs and he was not able to fill all the shifts. (Tr. 360.) Johnson worked on getting the building staffed, and met again at 8 a.m. in the intake area with Manager Wilson, Manager Sherrod, and Supervisor Carter and he told Carter who the employees were that called off. Carter said that he saw those employees' cars outside and he was going to find out why they called off work. (Tr. 363-364) Johnson testified that Sherrod then stated: "it don't matter about who called off; they're all going to get fired anyway." (Tr. 364) Sherrod also stated that he talked to Director Kirpheous Stewart and they were all going to be fired anyway. When Johnson asked how the Respondent was going to fire that many people because a lot of them had called-off, Sherrod simply repeated that it did not matter and they were going to be fired. (Tr. 365-367) Johnson testified that he stayed and worked the day shift because they were shortstaffed and he passed out medications and helped out. (Tr. 367.)<sup>11</sup>

Fernandez testified that she did not leave work that day until about 10 p.m. (Tr. 601-608). Security Supervisor Hionel Black testified that when he came in for his shift at 11 p.m. on July 6, 2015, Lincoln Shift Supervisor Clifford Judkins told him the employees were protesting and it was a "pretty hectic day." (Tr. 433.)

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<sup>11</sup> Johnson then met with Director Stewart and Fernandez and they talked about call-offs and who Johnson had staffed throughout the building. (Tr. 370.) Johnson, who was wearing a red work shirt, testified that Fernandez commented to him about the "nice shirt [he] had on." (Tr. 370-371.) Johnson testified that from 10:20 to 10:30 a.m. on July 6 he made more calls to get staff to come in to work. At that time, Manager Wilson told him that "anybody that had on the red work shirts had something to do with [the picketing]," and that many of the picketers had on red shirts like he did. (Tr. 373-374.) Johnson finally finished his shift at 2:30 p.m. and left the facility. Johnson's last day of work was two days later, July 8, 2015, when the Respondent discharged him. (Tr. 355)

8. The Respondent, on July 6, 2015, by Executive Director Melissa Fernandez, engaged in unlawfully surveillance of employees' protected concerted activities, and on July 9, 2015, by Calumet Security Supervisor Damon Dix, the Respondent created the impression that employees' protected activities were under surveillance and coercively informed an employee that he could be disciplined for engaging in protected activities, each in violation of Section 8(a)(1) of the Act

*a. The facts*

Respondent Security Supervisor Hionel Black, whose employment with the company ended in November 2016, testified that he was responsible for the operation controls on the perimeter and interior of the facilities. (Tr. 412) He reported to Security Manager Keith Leslie, who reported to Director of Operations Douglas Burke, who in turn reported to Executive Director Melissa Fernandez. (Tr. 414-415.) The Operations Control Center in the Calumet facility is where the facilities are monitored. It is usually manned by two to three security officers. One security officer is usually at the control board which contains monitors with views of the building and its perimeter. (Tr. 543-547) The monitors show the views from surveillance cameras stationed throughout the buildings and on the exterior of the buildings. (Tr. 413-414). Those cameras are able to scan, zoom in, and have detailed views of the inside and outside areas of the buildings. (Tr. 414.)

Neely testified that during the picketing, Fernandez and some of the supervisors came out of the building for about 10 minutes, approximately 40-50 feet away from him, where they were watching the picketers. (Tr. 327-329.) He testified that Fernandez was watching the picketers and she was writing something on a yellow pad of paper. In response, some of the employees tried to hide their faces. (Tr. 327-329.) After the picketing, Neely was called and told to report to work on July 9. When Neely was at work that day, Calumet Security Supervisor Damon Dix told him that he was with Fernandez in the security office during the picketing, and the cameras were "zoomed in" on them, and Fernandez was writing the names of the people down. (Tr. 331-332.) Dix further informed him that Fernandez had written his (Neely's) name down and he was on "the list." In that regard, Dix told Neely that "you need to watch your back, man." (Tr. 331-332.)

Neely's testimony on this subject was contradicted by Dix and Fernandez. Dix specifically denied that he told Neely that Fernandez was in the Operation Control Center room zooming in with the cameras on the picketers, or that Fernandez had his [Neely's] name on a list of the employee who picketed. (Tr. 829-830.) Fernandez testified that she did not see any employees picketing, despite the fact that several employees credibly testified that they were picketing on the street around the time Fernandez arrived at work and they saw her, and despite the fact that Neely saw her come out of the building and watch the employees picketing. (Tr. 690.) She testified that even though she had access to the Operations Control Center in the Calumet facility, and she was aware of the capabilities of the cameras and what they could see outside the building, she was never in the Control Center on July 6. (Tr. 683.) She also testified that she was not even aware that employees were picketing on July 6 and had "no idea why people had called off." (Tr. 703-704.) In addition, Fernandez denied that she prepared, or asked anyone else to prepare, a list of employees who participated in the concerted picketing activity. (Tr. 608.)



*b. The credibility determinations*

These differences in testimony warrant a determination of the credibility of these witnesses. My observation during the trial was that Neely testified in a truthful and consistent manner, and that he was a very credible witness. On the other hand, as mentioned above, I found Dix's demeanor less than forthright, his testimony was at times implausible, and he was not a credible witness. In addition to the reasons discussed above in which I found Dix was not a credible witness, I note that Dix's implausible testimony regarding the supervisors and managers discussions or interest in the employees' picketing constituted further evidence that he was not a credible witness. When asked on cross-examination whether the managers and supervisors had any reaction to or discussion about the employee's picketing activity, he testified there was neither interest in, or discussions or meetings about, such activity. (Tr. 831-833.) I find that testimony is not believable and it strains credulity to believe that employees picketing in front of the facility, which Dix admitted was an "unusual occurrence," (Tr. 832.) would not have generated interest by the managers and supervisors, and also discussions or meetings about such activity by the employees. I find that would be especially true for the managers and supervisors of the Security Department, of which Dix was an official.

I also find that where Fernandez' testimony differed from the testimonies of the General Counsel's witnesses, her testimony was not to be credited. She did not testify in a truthful manner and her testimony at times appeared insincere and evasive. In addition, she presented testimony that was implausible and simply not believable. With regard to the employees' picketing on July 6, she acknowledged that she was facing a "staffing crisis," and left for work as soon as she could that morning after being notified that many employees had called off, and she even donned her "youth worker" gear because she knew she would have to perform youth worker duties that day. (Tr. 598-602.) Yet, she presented a nonchalant attitude while testifying about the picketing, even conveying an odd air of indifference or lack of concern when questioned about the picketing activity. I found such testimony lacking in credibility, as it is simply implausible that the executive director of the facility would convey such little regard or concern for so many employees calling-off work and causing a crisis situation warranting reporting to the State agencies, especially when those employees were right outside the building.

In addition, despite Fernandez' testimony that she was facing a "staffing crisis" which she considered an "all hands on deck" situation, she incredibly testified that she had no knowledge of whether supervisory personnel who were not scheduled to be on duty that day, had come in to help out. (Tr. 663.) Furthermore, when she was asked on cross-examination whether it was a "pretty hectic situation," she simply asserted that it was unusual, which appeared to be an understatement and further evidence of her reluctance to testify truthfully.

I found equally incredible Fernandez' testimony that she was unaware of the picketing occurring on July 6. Even though she admitted arriving at work during the time the employees were engaged in picketing, she claimed to have not seen the picketing because she allegedly entered the property by driving in on an access road, and she did not drive in front of where the employees had their cars parked and were picketing. (Tr. 690.) However, even assuming that were true, on the morning of July 6 while she was at the facility dealing with the staffing crisis, attempting to find replacement workers, and contacting the state authorities, many of the

employees who called off work that day had parked their cars outside the building on the street or on the property in plain view of the Calumet facility where Fernandez was located, and they were standing with picket signs and chanting saying about their working conditions near the Calumet facility. Yet, incredibly, Fernandez testified that she had no knowledge of the employees picketing just outside the building. (Tr. 703–704.) In fact, her testimony when questioned by counsel for the General Counsel on cross-examination was as follows:

Q. And on July 6 you became aware of picketing that was occurring at the facility, correct?

A. Well, I wasn't aware that there was picketing . . . happening on July 6.

Q. On July 6 you were not aware of any picketing that was occurring—

A. I wasn't.

Q. —at the facility?

A. I was not aware of what was happening at that time. My focus on the 6th was contacting licensing bodies and staffing the building. There were a lot of call-offs, no idea why people had called off. (Tr. 703–704.)

Evidence of Fernandez' incredible testimony with regard to management's alleged lack of knowledge of the employees' picketing activity could also be found in her testimony on the subject of the suspensions issued to youth workers Sherman Cochran, Tamika Kelley, and Delaine Singleton-Green, which is discussed more fully below. Despite Fernandez' testimony that she did not know how those issued suspensions "came about" (Tr. 620–621), she acknowledged that the Respondent admitted in a Statement of Position submitted during the investigation of this case, that the three employees were suspended because the Respondent believed they called-off sick when in fact they were picketing. (Tr. 665–667.) Considering Fernandez' denial of knowledge, counsel for the General Counsel asked her how then did the Respondent know those three employees were picketing? In response, Fernandez answered: "I can't answer that." (Tr. 692–693.) Thus, I find Fernandez's testimony that she did not know the employees were picketing on that day, when she was inside Calumet dealing with the crisis, was not plausible or credible.

Thus, in instances such as these, where the testimonies of Dix and Fernandez differ from that of the General Counsel's witnesses, I fully credit the testimony of the General Counsel's witnesses, such as Neely. In making these determinations regarding credibility, the Respondent argues that Neely should not be believed because he was the only General Counsel witness to testify that he saw Fernandez outside watching the picking and appearing to write on a pad of paper. As mentioned above, I found Neely to be a truthful and solid witness who appeared honest and forthright. The fact that he was the only witness to testify about Fernandez' surveillance does not mean he was untruthful. To the contrary, Neely's testimony regarding statements that the Respondent was conducting surveillance of the picketing activity, was corroborated by the credible testimony of Former Manager Steven Johnson, who also testified that the employees' picketing activity was being watched by the Respondent. According to Johnson, Director Kirpheous Stewart called him to the administration office around 10 a.m. that day, and on the way there he cut through the security office. (Tr. 368.) While Johnson was in the security office he noticed on one of the security monitors that the security personnel had a

camera directed on the staff employees who were picketing, holding picket signs, and walking back and forth. (Tr. 368–370.) Thus, I find implausible, and I specifically discredit, Fernandez’ testimony that on July 6 she did not leave the building to watch the employees picketing, and that she was not in the Operational Control Center watching the picketing on the surveillance monitors to determine the identity of those employees engaged in the protected concerted activity.

I note that Former Security Supervisor Hionel Black credibly testified that on July 6, the day of the picketing, his night shift ended around 7:30 a.m., but shortly before that, at 7 a.m., he saw the picketers’ cars parked on the street on the camera monitors in the Operations Control Center. (Tr. 432.) I found that Black appeared to be an honest witness with a calm and convincing demeanor, and I credit most of his testimony at trial. However, there is one portion of his testimony that I do not credit or provide any weight. With regard to Respondent’s surveillance of the picketing activity, Black testified that later that day, when he was at his other job at Methodist Childrens, he called into the Operational Control Center and spoke to Supervisor Donald Farrell to see if any of his staff called off. According to Black, Farrell told him that Fernandez was in the control room watching the picketers with Kirpheous Stewart. (Tr. 431.) That testimony, however, was contradicted by Respondent’s security logs and pay records for that day, which do not support that Farrell was working at the facility at that time. (Tr. 810.) I find that specific testimony was inaccurate and not supported by the record, and I therefore do not credit it, or rely on it in reaching any determinations in this case.

The Respondent argues that all of Black’s testimony should be disregarded because his assertion about Farrell was not supported by the record, he was admittedly unhappy about being discharged by the Respondent, and the only reason he gave an affidavit against the Respondent was because he had been discharged. (R. Br. p. 37.) However, I find no merit in that argument. I examined Black’s demeanor very carefully at trial and I was convinced that he testified in a very truthful and convincing manner. Other than the one unsupported statement about Farrell, I found his testimony convincing and credible. Even though he may have been unhappy about being discharged by the Respondent, which would be understandable, I did not find that his testimony was offered in retaliation or retribution for his discharge. In that connection, on re-direct examination Black testified that the reason he provided an affidavit to the Government was actually to support of his own unfair labor practice charge that he filed with the NLRB over his discharge. (Tr. 452.) Despite the fact that he honestly admitted that he was not happy about being fired, he did not testify in a vindictive manner, but instead in a clear, unbiased, and straightforward manner that was worthy of belief. As mentioned above, credibility findings do not have to be all or nothing propositions, and it is not unusual for a judge to believe some of the testimony of a witness, but not other parts. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, supra at 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). Thus, in all other respects, I credit Black’s testimony in this case.

*c. The positions of the parties*

The General Counsel alleges that Fernandez conducted surveillance of the picketing activity, and Dix informed Neely that Respondent was conducting surveillance and coercively conveyed or threatened that Neely could be disciplined for such activity, in violation of Section 8(a)(1) of the Act. The Respondent denies that Fernandez engaged in the surveillance of protected activities, or that Dix made such statements about watching the picketers and Neely watching his back, and therefore no violations of the Act occurred.

*d. Analysis*

With regard to surveillance, it is well established that management officials may observe open and public union or protected activity on or near the employer's premises, without violating Section 8(a)(1) of the Act, unless such officials engage in behavior that is "out of the ordinary." *PartyLite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), *enfd.* 679 F.2d 875 (4th Cir. 1982). In this case, even though the employees picketed in the open on the Respondent's property and in view of the public, Fernandez and some of the supervisors stood outside the building and watched the picketers, and Fernandez was writing on a pad of paper while watching the picketers. While it may have been permissible for the Respondent to watch what was going on outside its facility to maintain the security of its property, it was "out of the ordinary" for Fernandez to stand outside the building and appear to write on a pad of paper while watching the picketers. I find such conduct coercive and clearly constitutes unlawful surveillance of the employees' protected concerted activities in violation of Section 8(a)(1) of the Act.

I also find that Dix, through his statements to Neely, violated Section 8(a)(1) of the Act by creating the impression that the employees' protected concerted picketing activities were under surveillance. In determining whether a statement or question created an unlawful impression of surveillance, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enfd.* mem. 181 Fed. Appx. 85 (2d Cir. 2006) (citing *Flexsteel Industries*, 311 NLRB 257 (1993)). In this case, Dix told Neely that during the picketing Fernandez was not only in the security office "zooming in" on and watching the picketers, she was writing down their names. Importantly, Dix further informed Neely that Fernandez had written his (Neely's) name down and he was on "the list," and that Neely needed to "watch [his] back." I find that Dix's statement would definitely cause reasonable employees to assume their protected activities had been placed under surveillance. In fact, I find that Dix's statements would leave little, if any doubt, that the employees' protected activities had been placed under surveillance and in violation of the Act.

Furthermore, I find that Dix's statement to Neely that he was on the "list," and needed to "watch [his] back," constituted an unlawful threat of discipline or a coercive statement informing him that he would be subject to discipline for engaging in protected concerted activity, in violation of Section 8(a)(1) of the Act. As mentioned above, an employer violates Section 8(a)(1) by statements that are coercive and which have a reasonable tendency to interfere with employees' rights under the Act. Dix's statement to Neely that he had been identified as

someone engaging in the protected activity, and that he should “watch [his] back,” would reasonably cause him to believe he would then be subject to discipline, and that would certainly tend to interfere with his free exercise of protected rights in violation of Section 8(a)(1) of the Act.

9. The Respondent, on July 7 and 10, 2015, by Calumet Facility Manager Leroy Sherrod, unlawfully threatened employees with discipline for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act

*a. The facts*

Neely also testified that on the following day, July 7, 2015, in a conversation with Calumet Facility Manager Leroy Sherrod, who came into pod 6 where Neely was working, Sherrod said, “you all was on that list,” and “you’re all hit.” (Tr. 334.) Neely testified that being “hit” was slang for “you all [are] in trouble.” (Tr. 334.) Similarly, Calumet youth worker Jamar Marcus testified that he participated in the picketing and when he returned to work, he had a conversation with Sherrod who told him the employees “messed up,” and they were going to get fired. (Tr. 390–391.) Sherrod also told him that “he was hit, like we’re on the hit list.” (Tr. 391.) In addition, Sherrod said “you all are stupid, like you all are hit, like they’re going to get rid of you all.” (Tr. 392.) Sherrod did not testify to rebut the testimonies of Neely and Marcus.

Facility Manager Steven Johnson also offered testimony consistent with Neely's and Marcus' assertions that Respondent indicated employees would be disciplined or discharged for engaging in the picketing activities. As mentioned above, on the morning of July 6, 2015, Johnson worked on getting the building staffed, and met again at 8 a.m. in the intake area with Manager Wilson, Manager Sherrod, and Supervisor Carter and he told Carter who the employees were that called off. When Carter indicated he was going to find out why they called off work, Sherrod stated: "it don't matter about who called off; they're all going to get fired anyway." (Tr. 364) Sherrod also reported that he spoke to Kirpheous Stewart and they were all going to be fired anyway. (Tr. 365-367.)

Kirpheous Stewart denied that he told Johnson that anyone who picketed would be discharged. (Tr. 775.) However, Johnson never testified that Stewart made the statement to him. He testified that Sherrod conveyed to him that Stewart said the picketers were all going to be fired, an assertion that was not contradicted or disputed by Sherrod. In addition, Stewart failed to deny making such a statement to Sherrod. However, to the extent that Stewart denied such a statement attributed to him, I credit Johnson's testimony and I discredit Stewart's, specifically determining that Stewart was not a credible witness and that his testimony, in particular his denial in this regard, is not worthy of belief.

*b. The positions of the parties*

The General Counsel contends Sherrod's statements to Neely and Marcus violated Section 8(a)(1) of the Act. The Respondent denies that the statements were made, or that the statements violated the Act.

*c. Analysis*

The Board has held that employers' threats of discipline or job loss for participation in protected concerted activities constitute violations of Section 8(a)(1) of the Act. *Baddour, Inc.*, 303 NLRB 275 (1991). In this case, Sherrod's statement to Neely that he was "on that list," and they were "all hit" (in trouble) was a coercive statement indicating that the Respondent identified him as being one of the people engaged in picketing, and that his participation in that activity meant he would be subject to discipline or discharge. Sherrod's statement therefore constituted a threat of discipline or discharge for engaging in protected, concerted activities in violation of Section 8(a)(1) of the Act.

Similarly, Sherrod's statement to Marcus constituted a violation of Section 8(a)(1) of the Act. After Marcus participated in picketing and returned to work, Sherrod told him the employees "messed up," and they were going to get fired. Sherrod also told him that he "was hit," and "on the hit list," and the employees who picketed were "stupid," and the Respondent was "going to get rid of [them]." These statements were equally coercive and interfered with Marcus' rights under the Act, constituting a threat of discharge for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

10. On July 9, 2015, the Respondent, by Calumet Security Supervisor Damon Dix, coercively informed employees that Respondent's management was upset about the picketing and threatened employees could be disciplined for such activity, in violation of Section 8(a)(1) of the Act

*a. The facts*

Simpson testified that he was not scheduled to work on July 7 and 8, 2015, but when he returned to work on July 9, Supervisor Dix came to pod 3 where he was working at around 8 a.m. and informed him that "upper management" was "pissed about the rally." (Tr. 139.) Specifically, Dix told Simpson that Fernandez was in the control room when the employees were picketing and she was zooming in with the surveillance cameras on the picketers, "taking names down," and she was "pissed." (Tr. 140.) According to Simpson, Dix told him that Fernandez had a "hit list for everyone who was outside," she had their names, and they better "be careful because she was gunning for whoever was at the Rally." (Tr. 140.)

*b. The positions of the parties*

The General Counsel asserts that Dix's comments threatened discipline or discharge to employees in violation of Section 8(a)(1) of the Act. The Respondent claims no violation of the Act occurred.

*c. Analysis*

I find that Dix's statement to Simpson that Fernandez and upper management were upset about the employees' engagement in protected concerted picketing activity, and that Fernandez recorded their names and "hit list" and was "gunning" for them, clearly inferred that they could be disciplined or discharged for engaging in those activities. Those statements had a reasonable

tendency to interfere with employees' rights under the Act. Accordingly, I find that Dix's statements to Simpson in this regard constituted threats to employees that they would be disciplined or discharged for engaging in protected concerted activities, in violation of Section 8(a)(1) of the Act.

11. On July 9, 2015, during Respondent's management meeting in which the employees' protected concerted activities were discussed, Fernandez directed the security officers to write down the names of the picketers so she would know the identity of employees who engaged in that protected activity

Security Supervisor Hionel Black testified that in July/August 2015, shortly after the picketing activity, the Respondent's weekly manager meetings for supervisors and managers, that were held every Thursday for about an hour, began to feature the employees' protected, concerted activities such as the picketing as a topic (and after that the Union as a topic). (Tr. 417-418) Those meetings, referred to as "Supervisor Meetings," were attended by Director of Operations Burke, Security Manager Leslie, all security supervisors, and on occasion, Executive Director Fernandez. (Tr. 418.) The purpose of the meetings was to provide updates on what was going on at the facility. (Tr. 419.)

Black testified that Fernandez attended her first such meeting on July 9, 2015, the Thursday following the picketing activity, and some of the Respondent's other managers, supervisors, and directors also attended, including Lincoln Center Director Oliver Cooper, Calumet Facility Manager Kirpheous Stewart, Lincoln Facility Manager James Crawford, Calumet Facility Manager Leroy Sherrod, Calumet Facility Manager Christopher Wilson, Lincoln Shift Supervisor Kerwin Johnson, Manager Childs, and Supervisor Donald Farrell. (Tr. 421-422, 424-425, 435-436.) The employees' picketing was a "hot topic" and there was discussion about how the call-offs were conducted and how the facility ran during the staffing shortage. (Tr. 422.) Black testified that the security personnel captured employees' engagement in picketing activities on the company surveillance cameras, and that a concern raised by Fernandez during that meeting was that she had to get names of everyone who was engaged in the picketing. (Tr. 423, 428, 436-437.) She wanted to know the identity of employees who engaged in that activity, and the security officers who were out there now had to write the names of the picketers on a paper. (Tr. 423.) Black was concerned because some of his security officers were out there picketing, and he did not want to disclose their identities to Fernandez. (Tr. 424.)

Black also testified that in a subsequent supervisor meeting the supervisors were told they "had to be meticulous" about time and attendance, and there was to be "no leeway," so if someone breaks a policy, the supervisors are to discipline them. (Tr. 427-428.)

12. In August 2015, the employees engaged in union activities by seeking to have the AFSCME union elected as their collective-bargaining representative

Simpson testified that after the picketing the employees contacted the AFSCME Union and there was a union organizing drive which he was involved in and where he solicited union authorization cards. (Tr. 144-145.) Youth Worker Clarence Atwater contacted the organizer for the AFSCME union, and shortly after the picketing activity on July 6, 2015, he notified the organizer of the employees' concerns with regard to their terms and conditions of employment.

(Tr. 85.) Tamika Kelley was also involved in the union organizing drive by talking to employees about the union, soliciting union authorization cards, and meeting with the union organizer to discuss organizing the employees. (Tr. 266, 270.)

5 A few days after passing out ASFCME authorization cards, Simpson noticed antiunion pamphlets and literature posted on the bulletin board in the men's locker room at work. (Tr. 146.) Such material concerned articles or postings on the advantages of being union-free, collective-bargaining risks, negotiation facts, facts about strikes, questions to ask AFSCME, and some things to think about regarding unionization as risky business. (GC Exh. 3.) Kelley also  
10 noticed anti-union materials posted in the women's locker room, control room, and on a bulletin board at the facility. (Tr. 266, 305-306.) Security Supervisor Black testified that in July/August 2015, after the picketing activity, the weekly Thursday "Supervisor Meetings" held for supervisors and managers, began to feature the union as a topic. (Tr. 417-418.) He stated that the purpose of those meetings was to provide updates on what was going on at the facility, which  
15 then included "union stuff." (Tr. 419.)

The Respondent contracted with a company to counter the union organizing campaign. (Tr. 800-802) The vice president of human resources, Donald Fields, testified that he would have been involved in bringing in an anti-union campaign, and he attended the meetings held at  
20 the Lincoln facility that concerned bringing in a company for that purpose. (Tr. 812) According to Fields, the meeting was also attended by President and CEO Roger Swaniger, Human Resources Administrator James Wiser, Executive Director Fernandez, Lincoln Center Director Oliver Cooper, and Facility Manager Kirpheous Stewart. Despite the fact that Fernandez attended that meeting, she seemed unsure as to what that company was contracted to do, or  
25 whether the Respondent even contracted with such a company to deal with responding to the union organizing campaign. In that regard, when Fernandez was asked at trial if the Respondent conducted a union-avoidance campaign, she answered: "I wouldn't call it that." (Tr. 693-694). In addition, when she was asked if the Respondent even contracted with a company to talk to employees about the union, she answered, "I believe so." (Tr. 694) In any event, Fernandez  
30 testified that she had not seen any of the anti-union flyers mentioned above which were posted at the facilities. (Tr. 694-695)

On August 7, 2015, AFSCME filed a representation petition in Case 07-RC-157539 seeking to represent the Respondent's employees. (Tr. 86; GC Exh. 32.) AFSCME sought to  
35 represent a unit of "Youth Specialists, Cooking Staff, Maintenance, Laundry, Security Transport, Custodian." (GC Exh. 32.) Subsequently, an AFSCME organizer informed Atwater that the AFSCME union would not be able to represent Respondent's employees because the youth workers were considered to be security officers. (Tr. 85.)

40 13. In August/September 2015, in one of Respondent's weekly employee meetings, Lincoln Facility Manager James Crawford unlawfully interrogated employees regarding their protected concerted and union activities in violation of Section 8(a)(1) of the Act

*a. The facts*

45 The record establishes that the Respondent also held weekly meetings with employees to address issues or concerns. Kelley testified that in August 2015, in one of the Respondent's



weekly meetings, Lincoln Facility Manager James Crawford addressed the employees. (Tr. 267–268.) In speaking about issues in the pods, Crawford brought up the Union. Kelley testified that he asked if the employees were going to try to organize the Union, and he asked if they were going to try to “rally.” (Tr. 269.) According to Kelley, he asked why they were going to  
 5 organize the union and he stated that it was not good for the employees because the union takes their wages and their jobs were not guaranteed if they joined the union. Kelley testified that, at that time, employee Lisa Crawford (apparently no relation to James Crawford) responded that the employees were “damned if they do and damned if they don’t,” and that the employees exhausted their options with management so why not try the union. (Tr. 270.) Kelley testified  
 10 that in that meeting, Manager Crawford also asked her if she was going to join the union, and she told him that she “was not comfortable” speaking with him about it because it could be held against her. (Tr. 270, 306.)

Employee Ruth Crosby testified that on every Saturday the Respondent’s managers and  
 15 supervisors had employee meetings in the multi-purpose room at the Lincoln facility. (Tr. 488.) On the Saturday of the week of July 6, 2015, in one such meeting, Manager Crawford and Lincoln Shift Supervisor Michael Caston were present and addressed the employees. (Tr. 487–488.) Crosby testified that, in that meeting, Crawford asked the employees how they felt about a union coming into the facility. (Tr. 488–489.) According to Crosby, the employees expressed  
 20 that they did not “feel comfortable” speaking to him about the Union. (Tr. 488–489.) Crawford did not testify in this proceeding to rebut the statements attributed to him.

*b. The positions of the parties*

25 The General Counsel argues that Crawford’s questioning of employees constituted unlawful interrogation in violation of the Act. The Respondent argues that the statements attributed to Crawford do not rise to the level of an 8(a)(1) violation.

*c. Analysis*

30 In determining whether the circumstances of Crawford’s questioning of employees in these meetings reasonably tended to restrain, coerce, or interfere with employees’ rights under the Act, I find that applying the *Intertape Polymer Corp.*, supra, factors establishes that the questioning constituted coercive interrogation that restrained and interfered with their rights  
 35 under the Act. As mentioned above, there is evidence of Respondent’s hostility toward protected complaints from employees about working conditions as seen from Dix’s earlier statement that the Respondent would “. . . not talk about shit” with the employees, and that management, especially Executive Director Fernandez, were “pissed” or upset about the employees protected concerted picketing activity. The fact that the questioning occurred when the Respondent  
 40 became aware that employees were seeking to have a union represent them, is also evidence that the questioning was coercive. The nature of the information sought—whether the employees supported or planned to join the union—reflects the coerciveness of the interrogation, as it concerned their core rights under the Act. With regard to the “identity of the questioner” factor, Lincoln Facility Manager Crawford is a high-ranking upper management official, warranting the  
 45 conclusion that the interrogation was coercive in nature. See *Matros Automated Electrical Construction Corp.*, 353 NLRB 569, 571 (2008), enfd. 366 Fed.Appx. 184 (2d Cir. 2010)

(interrogations from high-ranking employer officials weigh in favor of finding that the questioning was coercive).

The method of the interrogation is also evidence of its coerciveness, as Crawford asked the employees directly about their interest in organizing or supporting a union. I find he had no valid reason for asking those questions of the employees, other than to solicit who was involved in the organizing. In addition, it is important to note that in making those inquiries, Crawford did not assure the employees that no reprisals would result if they answered his questions, even though the employees expressed concerns that that is exactly what they thought would happen. Finally, the fact that employees refused to answer the questions because they did not feel comfortable about expressing their union support or sympathies, serves as further evidence that they were intimidated and feared reprisals by management. See *Camaco Lorain Mfg. Plant*, supra; *Sproule Construction Co.*, supra; *Grass Valley Grocery Outlet*, supra.

Accordingly, I find that Crawford's questioning of the employees constituted instances of unlawful interrogation of their union sympathies and support, in violation of Section 8(a)(1) of the Act.

14. Once the employees found out that AFSCME could not represent them, the SPFPA Union conducted an organizing drive and was subsequently elected and certified as the collective-bargaining representative of the Respondent's unit employees

Tamika Kelley testified that after the employees were informed by the AFSCME officials that their union could not represent the employees, they were referred to the SPFPA union for representation. (Tr. 270.) Atwater testified that he contacted Dwayne Phillips, an organizer for the SPFPA, and that union conducted an organizing drive at the Respondent's facility. (Tr. 87-88) Kelley and Atwater then became involved in the organizing drive for the SPFPA by passing out union authorization cards. (Tr. 271.)

On February 11, 2016, the SPFPA Union filed a representation petition with the National Labor Relations Board in Case 07-RC-169521, seeking to represent a unit of Respondent's employees consisting of all full-time and part-time armed and unarmed security officers, including direct care and youth workers. (Tr. 705-706; Jt. Exh. 4.) In that election, a majority of the unit employees voted in favor of the SPFPA (the Union), and the NLRB Regional Office for Region 7 issued a Decision and Certification of Representative on March 24, 2016. (Jt. Exh.4.)<sup>12</sup>

15. The Respondent, on July 7, 2015, suspended employees Tamika Kelley, Sherman Cochran, and Delaine Singleton-Green for engaging in protected concerted picketing activity in violation of Section 8(a)(1) of the Act

#### *a. The facts*

Current employee Sherman Cochran is a youth worker employed at the Lincoln facility. (Tr. 184.) He testified that he participated in the picketing on July 6 after calling-off of work.

<sup>12</sup> The Regional Director for Region 7 also issued an Erratum dated August 17, 2016, which corrected the description of the appropriate bargaining unit to reflect the Employer's facilities located in "Highland Park," instead of "Highland," Michigan. (Jt. Exh. 2.)

He was scheduled to work the midnight shift, which began at 10 p.m. on July 5. He called off from work at around 4 p.m. in order to participate in the picketing on July 6, 2015. (Tr. 189–198.) Cochran testified that he had personal days available to cover his absence. (Tr. 193–198.)

5 He arrived at 9:30 a.m. and engaged in picketing for approximately 4–5 hours. (Tr. 188–189.) When he returned to work at 10 p.m. on July 7, 2015, Lincoln Shift Supervisor Clifford Judkins informed him that he had been suspended and he had to see Lincoln Center Director Oliver Cooper concerning his “time and attendance” on July 6. He was also informed that he was being suspended for a July 4 call-off. (Tr. 192.) Cochran testified that he spoke to Cooper the next day and was told to report for work that night and he was subsequently paid for the day he was suspended. (Tr. 198–199.) Cochran testified that he was never informed by any of Respondent’s management officials that his discipline/suspension had been rescinded or removed from his personnel file. (Tr. 199.)

15 Tamika Kelley, a current employee and youth worker at the Lincoln facility testified that she was scheduled for work on July 6, 2015, but she called off within the required time period. She testified that the Respondent’s policy was to call-off at least 3 hours before the shift, which she complied with, and she had personal leave time available to cover the time she called off. (Tr. 259–261.) Kelley called Lincoln Shift Supervisor Clifford Judkins and told him she would be absent from work because of personal reasons. (Tr. 259–260.) Judkins told her that she was his favorite staff person and she must come to work. (Tr. 260.) Kelley stated again that she would be absent for personal reasons. Judkins asked her if she wanted him to memorialize the reason for the absence and she said yes. Judkins then stated that he already had several other employees call-off that day. (Tr. 260.)

25 Kelley engaged in the picketing on July 6. On July 7, 2015, when she returned to work she was informed not to clock in. Lincoln Shift Supervisor Kerwin Johnson met with Kelley and Delaine Singleton-Green and he issued them both suspensions pending investigations based on their “time and attendance.” (Tr. 262; GC Exh. 11.) Kelley notified employees who were participating in the picketing on July 7 that Respondent issued her a disciplinary suspension pending investigation. (Tr. 329, 691.) Kelley served her suspension on July 7, 2015. (Tr. 264–265.)

35 Kelley was subsequently told by Manager George to report for work on July 8 and she was eventually paid for the day she was suspended. (Tr. 264–265), 306–307.) However, she testified that she was never informed by the Respondent that the discipline she was issued had been rescinded, or that the references to her discipline would be removed from her personnel file. (Tr. 265, 308.)

40 On July 7, 2015, the picketing continued for a second day at around 8:30 a.m. (Tr. 83, 329.) As a result of the Respondent’s issuance of disciplinary suspensions to Kelley, Cochran, and Singleton-Green, the employees believed they would be suspended or discharged if they continued picketing, so the picketing ended shortly after it began. (Tr. 329.) In that connection, Neely testified that he and other employees went to picket on July 7, 2015, but that it was only for a short duration because the employees became aware that several employees had been suspended for picketing, and “the air just went out of [them].” (Tr. 329.) Kelley then filed her unfair labor practice charge with the NLRB on July 7, 2015. (Tr. 329–330; GC Exh. 1(a)-(c).)

At trial, the Respondent produced letters dated July 9, 2015, to Cochran, Kelley, and Singleton-Green. (R. Exh. 9.) The letters for each employee contained identical wording from Lincoln Center Director Oliver Cooper that stated:

5           This letter serves to inform you that we have completed our review of your attendance. You will be allowed personal leave for July 6, 2015. You will also be paid for July 7, 2015, and the suspension notice will be removed from your file. Should you have further questions regarding this letter, please contact James  
10           Wiser in the Human Resources Department. (R. Exh. 9.)

15           Kelley testified that she never received that letter, and the address on the letter where it was allegedly sent, was not, and had never been, her address. (Tr. 308-309.) Cochran also testified that he was never informed that his suspension was rescinded, and there is no evidence that Singleton-Green was notified or received a letter informing her that her suspension was rescinded.

20           In regard to these letters, Wiser, the person Oliver directed employees to contact if they had any questions regarding their suspensions, testified that he could not recall actually removing the disciplinary suspensions from their employment records or files. (Tr. 732-733.) In addition, Vice President of Human Resources Donald Fields testified that with regard to those letters allegedly sent to the three employees, he could not recall if he assisted in issuing the letters, he did not know the date the disciplines were allegedly removed from their respective employment records, and he did not know who, if anyone, allegedly removed the disciplines from the records.  
25           (Tr. 797-800).

30           The Respondent denied the complaint allegations that it suspended Cochran, Kelley, and Singleton-Green, and it further denied that it suspended them for engaging in protected concerted activities such as submitting the employees' petition to the Respondent and engaging in picketing activity. At trial, however, the Respondent never offered any testimony explaining the reason for issuing those three employees suspensions. In fact, Fernandez testified she had no knowledge of why the suspensions were issued, claiming that she believed they were suspended for "attendance," but she did not know how that came about. (Tr. 621-623.) Her only involvement allegedly occurred after the suspensions were issued, when human resources  
35           personnel contacted her and she then got involved by deciding to allow those employees to take leave. Fernandez could not state with any certainty that the suspensions were officially retracted, only that she "understood" that they were paid for the days they were suspended, and the notices of discipline/suspension were removed from their files. (Tr. 622.)

40           Fernandez' assertion that she knew nothing about why the three employees were suspended was incredible considering the fact that she was the executive director who oversaw not only the operation of the facility, but all discipline issued. In addition, her claim of not knowing the reasons for the suspensions was contradicted and belied by Respondent's Statement of Position dated July 20, 2015, provided to the government during the investigation of the  
45           charge, which stated:

Initially, it was believed the Charging Party [Kelley] had called in sick but instead was picketing at the [Respondent's] facility. Because of the suspected misrepresentation of need for sick leave, the Charging Party was told that she would be suspended for 1 day." (Tr. 663-666.)

Thus, contrary to Fernandez's alleged lack of knowledge as to why the three employees were suspended, the evidence establishes that they were suspended for their picketing activity, and the Respondent's belief that they misrepresented or misused their leave for that purpose.

While the Respondent presented evidence of letters in the employees' names that stated the suspensions were removed from their files, there is no credible evidence that the Respondent issued those letters to the three employees, or that they received the letters. It is also important to note that the three employees used accrued leave (personal days) when they called off work that day, and they did not use "sick" leave as the Respondent alleged in its Position Statement. (Tr. 663-666.)

*b. The positions of the parties*

The General Counsel contends that Cochran, Kelley, and Singleton-Green were suspended for engaging in picketing activity in violation of Section 8(a)(1) of the Act. The Respondent failed to offer a legitimate reason for the suspensions, but nevertheless denied that the suspensions violated the Act.

*c. Analysis*

As mentioned above, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," and Section 7 of the Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." That statutory right thus includes the right to act together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), end. 358 Fed.Appx. 783 (9th Cir. 2009). The Act accordingly prohibits employers from disciplining or discharging employees for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid or protection. See *MCPC Inc. v. NLRB*, 813 F.3d 475, 479 (3d Cir. 2016).

The Board has held that an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" for it to be protected under Section 7 of the Act. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). The Supreme Court, however, has held that Congress did not intend to limit the protection of Section 7 of the Act to situations "in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984). The Supreme Court has recognized that the concept of "mutual aid or protection" concerns "... the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve

their lot as employees.” *Fresh & Easy Neighborhood Market*, supra at slip op. at 3, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The “concertedness” and “mutual aid or protection” elements under Section 7 are analyzed under an objective standard, whereby motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, supra, slip op. at 3. The analysis instead focuses on “. . . whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.” Id.

In this case, it is undisputed that the employees, including Cochran, Kelley, and Singleton-Green, engaged in picketing activity to inform the Respondent of their workplace complaints and concerns, and that the picketing directly concerned improving their terms and conditions of employment. That activity clearly concerned matters of “mutual aid or protection” of the Respondent’s employees. *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975). Their picketing therefore constituted protected activity under the Act. *Eastex*, supra; *Reliant Energy, LLC*, 357 NLRB 2098, 2100 fn. 19 (2011); See *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974).

Besides constituting protected activity, their picketing was in concert with other employees. As mentioned above, the Board has held that an employee’s conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection” for it to be protected under Section 7 of the Act. *Fresh & Easy Neighborhood Market*, supra, slip op. at 3. The Board defined concerted activity in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), as activity “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The Board clarified that definition of concerted activity in *Meyers II*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), to include cases “where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Id. at 887. In this case, Cochran’s, Kelley’s, and Singleton-Green’s picketing activity intended “to initiate or to induce or to prepare for group action” in support of their concerns over working conditions, and their activity clearly constituted protected concerted activity. The record also establishes that the Respondent suspended them for engaging in that activity.

In analyzing this allegation, I note that where an employer argues that it disciplined or discharged employees for reasons unrelated to their protected activity, such as tardiness, poor work performance, or as in this case, because they “misrepresented the need for sick leave,”<sup>13</sup> the Board and the courts rely on the so-called “mixed motive” or “dual motive” discharge test set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); See also *MCPC Inc. v. NLRB*, 813 F.3d 475, 490 (3d Cir. 2016). In *Wright Line*, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer motivation. Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s adverse action. On such a showing, the burden shifts to the employer to demonstrate that the same action would

<sup>13</sup> See Tr. 663–666.

have taken place even in the absence of the protected conduct. *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The General Counsel satisfies the initial burden under *Wright Line* by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) animus against that activity on the part of the employer. *Mesker Door*, supra at 592 fn. 5; *Donaldson Bros. Ready Mix*, supra at 961; (2004); *L. B. & B. Associates, Inc. d/b/a North Fork Service Joint Ventures*, 346 NLRB 1025, 1026 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004); See also *DHL Express (USA), Inc.*, 360 NLRB 730 (2014). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Mesker Door*, supra; See *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). As support for an inference of unlawful motivation, the Board may rely on, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. *Mesker Door*, supra; See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). In addition, the Board may infer animus against protected activities from pretextual reasons given for the adverse employment action. *DHL Express*, supra, slip op. at 1 and fn. 1 (2014).

On such a showing, the burden shifts to the employer to prove that it would have taken the adverse action even in the absence of the employee's protected conduct. *Lucky Cab Co.*, 360 NLRB 271, 276 (2014); *Austal USA, LLC*, 356 NLRB 363, 364 (2010). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, (i.e., false reasons or reasons not in fact relied upon for the adverse employment action). Rather, it is well established that a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Lucky Cab Co.*, supra, at 276; *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012). In addition, it is apparent that the employer does not sustain its burden by simply showing that a legitimate reason for the action existed. As the Board stated in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984):

We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, and affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, 251 NLRB at 1088 fn. 11; *Bronco Wine Co.*, 256 NLRB 53 (1981); *Rikal West, Inc.*, 266 NLRB 551 (1983). Cf. *Magnesium Casting Co.*, 259 NLRB 419 (1981).

Therefore, in rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the employer's decision, the employer cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

Based on the record evidence, I find that an analysis under *Wright Line* demonstrates that the suspensions of Cochran, Kelley, and Singleton-Green were discriminatorily motivated.

## (i) The General Counsel made a prima facie case of discrimination

First, the General Counsel has made a prima facie showing that Cochran, Kelley, and Singleton-Green's protected conduct was a "motivating factor" in the Respondent's decision to suspend them. In fact, the undisputed evidence establishes that Respondent admitted that they had called off work to engage in picketing, and it believed they misrepresented their need for such leave. (Tr. 663-666.) There is thus no question that Respondent was aware of their protected activity and it was the reason they were suspended. There is likewise no question that Respondent harbored animus toward the protected concerted picketing activity as evidenced by the manager's statements that Fernandez and management were "pissed" and upset about the picketing, and that those employees were on hit lists and they would be disciplined or discharged.

On such a showing, the burden shifts to the Respondent to demonstrate that the employees would have been suspended even in the absence of the protected conduct. As mentioned above, the burden is not sustained by showing a legitimate reason for the suspensions existed, but instead the Respondent must demonstrate by a preponderance of the evidence that they would have been suspended even in the absence of their protected conduct. *Roure Bertrand Dupont, Inc.*, supra. For the reasons set forth below, I find the record establishes that the Respondent's asserted reasons are pretext for its unlawful motivation, and that the Respondent has not carried that burden.

## (ii.) The Respondent's asserted reasons for Cochran, Kelley, and Singleton-Green's suspensions are without merit and are pretext for its unlawful motivation.

The evidence shows that Respondent suspended the three employees because they were picketing and they misrepresented their need for sick leave. The assertion that they used sick leave, however, is without merit because they used personal time or leave to take off of work, and they did not use sick leave as Respondent alleged. The Respondent's asserted reasons for the suspensions are therefore not supported by the record, are not credible or plausible, and are pretext for a discriminatory motive—for their engagement in protected concerted picketing activity. An inference of animus and discriminatory motive may be derived from examining all the circumstances of a case, including suspicious timing, a false justification given for a discipline, and the failure to adequately investigate alleged misconduct. *Integrated Electrical Services*, 345 NLRB 1187, 1199 (2005); *Washington Nursing Home*, 321 NLRB 366, 375 (1996). In addition, providing a false justification for a discipline supports an inference that Respondent has another motive for its actions that it wants to conceal. *Pan American Electric*, 321 NLRB 473, 476 (1996); *Shattuck Denn Mining v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Based on the above, the Respondent failed to show that it would have taken the same action against Cochran, Kelley, and Singleton-Green in the absence of their protected, concerted activities. Accordingly, based on the record evidence in this case and the well-established Board law discussed above, I find that the Respondent unlawfully suspended Cochran, Kelley, and Singleton-Green based on their protected concerted activities, in violation of Section 8(a)(1) of the Act.<sup>14</sup>

<sup>14</sup> I further find that Respondent did not cure the disciplinary suspensions. While there is evidence



16. The Respondent discharged employee Alfred Neely for engaging in protected concerted picketing activity, in violation of Section 8(a)(1) of the Act

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*a. The facts*

Alfred Neely was hired as a youth worker by the Respondent in January 2011. (Tr. 311–312) While Neely worked at both the Calumet and Lincoln facilities, he spent the majority of his worktime at the Calumet facility. (Tr. 312.) Neely testified that while he was picketing, he saw Fernandez come out of the building and she was watching the picketers. The credible record evidence further reveals that Fernandez was watching the picketing on the monitors, identified the employees such as Neely who were engaged in such action, and recorded their names on “hit lists.”

On August 19, 2015, while working in a classroom in his pod, he was participating in a board game with his residents and a teacher named Mrs. Spratt. (Tr. 334.) One of the residents asked Neely for a sweater that was kept in the pod’s control room. Neely directed the resident to the youth worker he was working with at the time, Jamar Marcus, who was closer to the pod control room. (Tr. 335, 393–394.) Marcus then left the room to get the sweater from the control room. (Tr. 335–336.) Marcus testified that while in the control room, he made a telephone call to his mother to inform her that a family member died. (Tr. 394.) Shortly thereafter, Fernandez, accompanied by Operations Manager Keith Leslie, entered the control room and found Marcus on the telephone, sitting in a chair with his feet up on the desk. (Tr. 394, 630–631, 805–806.) Marcus then got the resident’s sweater and returned to the pod room where Neely was with the residents. (Tr. 394.) Fernandez and Leslie followed Marcus.

At the end of their shift (around 2 p.m.), both Neely and Marcus were called to the office, where Sherrod informed Neely he was being suspended pending an investigation. (Tr. 339; GC Exh. 23.) When Neely asked the reason for the suspension, Sherrod told him he must write a statement explaining why Marcus was on the telephone. (Tr. 339.) Neely stated that Marcus told him he was going to get the resident’s sweater, and that he did not know Marcus was on the phone. (Tr. 339–340.) Neely stated that he did not understand why he was required to write a statement and be issued discipline because of Marcus’ conduct, but both he and Marcus drafted statements as directed by Respondent. (Tr. 340.)

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On August 19, 2015, the Respondent issued discipline to both Marcus and Neely in the form of a “Suspension Pending Investigation” which stated they violated Respondent Rule 4137, “Staff to Resident Ratio,” and Rule 4127 “Youth Supervision Rule” and were suspended while the investigation was conducted. (Tr. 397–398; GC Exh. 23, 27.) On that same day, Neely met with Vice President of Human Resources Donald Fields who told Neely he did not understand how Neely did anything wrong. (Tr. 348) Fields told Neely that in the future he should notify his

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that Respondent paid the employees for the suspended day in question, there is no credible evidence that the suspensions were rescinded, or that the employees were informed that their suspensions were rescinded. Furthermore, the undisputed record establishes that the second day of picketing ended just after it started and was called off due to information that the three employees were suspended for picketing on the first day. Thus, the Respondent’s unlawful and discriminatory actions against Cochran, Kelley, and Singleton-Green infringed on the Sec. 7 rights of other employees.

supervisor and tell Marcus not to use the phone. Fields said he would send an email to Fernandez because Neely did nothing wrong. (Tr. 348-349; GC Exh. 22.)

Fields testified in this case on the Respondent's behalf. According to Fields, he received the "internal investigation" packet of documents concerning Respondent's decision to discharge Neely from Fernandez dated August 19, 2015, and he "approved" the decision to discharge Neely. (Tr. 788-790; R. Exh. 13). Fields' testimony inferred that since he approved Neely's discharge, he believed there was sufficient basis to justify it. However, that testimony was belied by the fact that, despite testifying, Fields neglected to rebut the allegation that he told Neely he did nothing wrong which would warrant his discharge. (Tr. 786-802)

On or about August 29, 2015, Human Resources Administrator James Wiser contacted Neely by phone and told him that his employment was being terminated. (Tr. 342.) When Neely asked why he was terminated for conduct that Respondent attributed to Marcus, Wiser stated that Fernandez, Fields, and CEO Roger Swaninger decided to terminate him. (Tr. 342-345, 786-787.) Upon hearing that, Neely attempted to reach Fields by telephone, but received no response. (Tr. 349.) The Respondent issued Neely a letter dated August 26, 2015, stating that he was discharged. (Tr. 349-350; GC Exh. 24.) That letter stated that:

The internal investigation has found that you violated the company's policies on, Prohibited Conduct #2—Client neglect, Prohibited conduct #6- creating unsafe conditions, State licensing rule # 4137-Staff to Resident Ratio, and State likening [sic] Rule 4127 Youth Supervision Rule. And weight was given to your previous violation in November of 2014, when you left your Pod early at shift exchange. (GC Exh. 24)

Thus, both Neely and Marcus were suspended and discharged for letting the ratio of residents-to-staff drop below the allowable figure.<sup>15</sup> According to the Respondent's policy (GC Exh. 25), the staff ratio is one staff member to every 10 residents. In this case, there were three staff members in the classroom: youth workers Neely and Marcus, and teacher Spratt. During the trial, Respondent presented the theory that teachers are not trained and not considered staff members, but evidence was presented that teachers did receive some training in the same manner as youth workers, and that they are considered staff members. In analyzing this issue, however, I will provide the Respondent with the benefit of the doubt and analyze it with the understanding that teachers are not considered in the staff-to-resident ratio.

*b. The positions of the parties*

The General Counsel contends that the Respondent discharged Neely because of his protected concerted picketing activity in violation of Section 8(a)(1) of the Act. The Respondent, however, argues that it was justified in discharging Neely because he and Marcus they let the ratio of resident-to-staff drop below the allowable figure.

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<sup>15</sup> There are no complaint allegations that Respondent violated the Act by discharging Marcus.

*c. Analysis*

Applying *Wright Line*, supra, the General Counsel has made a prima facie showing that Neely's protected conduct was a "motivating factor" in the Respondent's decision to discharge him. The evidence established that Neely engaged in picketing on July 6, 2015, and that the Respondent was aware of his protected activities. After the picketing, several employees were warned by managers that Fernandez had a list of employees who picketed and she intended to discharge them. Sherrod specifically informed Neely that he was on that list. There is also no question that Respondent harbored animus toward the protected, concerted picketing activity as evidenced by the manager's statements that Fernandez was "pissed" and upset about the picketing. In fact, there is direct evidence of animus toward Neely in that Supervisors Dix and Sherrod told him that his name was on the list and he better watch his back because Fernandez was going to discharge the people involved. It is also important to note that the timing of Neely's discharge was suspect, as it occurred within 2 months of Neely's engagement in protected picketing activity. As support for an inference of unlawful motivation, the Board may rely on factors such as the timing of the discipline relative to the employee's protected activity. *Mesker Door*, supra; See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

On such a showing, the burden shifts to the Respondent to demonstrate that Neely would have been discharged even in the absence of his protected conduct. As mentioned above, the burden is not sustained by showing a legitimate reason for the discharge existed, but instead the Respondent must demonstrate by a preponderance of the evidence that he would have been discharged even in the absence of his protected conduct. *Roure Bertrand Dupont, Inc.*, supra. I find the record establishes that the Respondent's asserted reason for discharging Neely is pretext for its unlawful motivation, and that the Respondent has not carried that burden.

Neely was discharged because of the actions of his co-worker, Marcus, who left to retrieve a sweater for a resident from the control room, but instead was found kicked back with his feet on the desk talking on the phone. The record, however, established that it was not uncommon for youth workers to leave the residents while they were in the pod classrooms in order to retrieve items for them. It is also undisputed that Neely, who remained in the pod classroom interacting with the residents, continued to perform his job as he was expected to do. The Respondent failed to present any credible evidence that Neely could see Marcus engaging in that prohibited conduct, that he aided in Marcus' conduct, or that he was even aware of it while it was in progress. While the Respondent correctly points out that Marcus subsequently admitted to management that he left the classroom out-of-ratio, and Neely's response was that he was not the one who left the pod, it argues that Neely's discharge was nevertheless justified because "it does not relieve [Neely] from the obligation to make sure there is proper ratio, to call for support from supervision, and to report the violation." (R. Br. p. 19, fn. 14.) This argument, however, is not only without merit, it is nonsensical. The record reveals that when Marcus left the classroom, he informed Neely that it was for an accepted and legitimate purpose, that is, to retrieve a sweater for a resident. The record is devoid of evidence showing that Neely could have, or should have, seen what Marcus was doing in the control room, or been aware that Marcus was not retrieving the clothing as he said he would. Thus, Neely could not be expected to call for support from supervision and report Marcus' violation, when in fact he could not have seen that Marcus was engaging in that conduct. Thus, Neely had no way of knowing that Marcus was engaged in such proscribed conduct.

Furthermore, and importantly, the Respondent's assertion that Neely's discharge was justifiable is belied by the fact that Vice President of Human Resources Fields informed Neely that he did not see how he did anything wrong to justify his discharge. As there is an insufficient and false justification given by Respondent for Neely's discharge and a failure to provide evidence that an investigation revealed that Neely was somehow responsible for Marcus' actions when he was out of the classroom and out of sight from Neely, warrants an inference that his discharge was discriminatorily motivated. *Integrated Electrical Services*, supra at 1199; *Washington Nursing Home*, supra at 375. Therefore, I find that the Respondent failed to rebut the General Counsel's showing that Neely was discharged for engaging in protected concerted activities.

Accordingly, I find that the Respondent discharged Neely because of his engagement in protected concerted activities, in violation of Section 8(a)(1) of the Act.

17. The Respondent discharged employee Lamont Simpson for engaging in protected concerted picketing activity, in violation of Section 8(a)(1) of the Act

*a. The facts*

Lamont Simpson was hired by the Respondent in June 2011. In October 2014, he began working a second job as a part-time employee at Motor City Casino (herein casino) in the area, working there primarily on weekends. (Tr. 150.) In working both jobs, Simpson worked approximately 24–32 hours a week at the Respondent's facility. In 2014, Respondent mandated Simpson to work overtime and a conflict arose in his scheduling because he was being mandated on the same days that he was scheduled to work at the casino or when he had to pick up his daughter from daycare. (Tr. 152–153, 164.) To deal with the scheduling conflict, Simpson arranged for one of his fellow employees to work his mandated shifts, or, in a deal worked out with Supervisor Leroy Sherrod, if Simpson bought lunch for him (or sometimes for Sherrod and other supervisors on duty) he would be removed from the mandated list. (Tr. 152–155.)

In around early 2015, Sherrod told Simpson that he could no longer accept lunches to accommodate scheduling conflicts because the Respondent was allegedly shortstaffed. (Tr. 155–156). Simpson testified that he doubted the validity of that assertion because he knew of contingent employees who wanted to volunteer for more hours, but they were unable to secure those hours. (Tr. 156.) In order to accommodate Respondent's mandated scheduling, Simpson testified that he worked mandated shifts on his Mondays or Tuesdays (his regularly scheduled days off), so that he would not be scheduled for weekends. (Tr. 160.)

On or about the week of August 10, 2015, Simpson asked Supervisor Emanuel Carter whether it would be possible for him to provide his casino work schedule so that he would not be mandated to work on those scheduled dates. (Tr. 159–160, GC Exh. 5.) Simpson testified that Carter informed him that he would see what he could do, and Simpson also told Manager Childs that while he did not mind being mandated, he simply requested that such mandated scheduling not conflict with his casino work schedule. (Tr. 159–161.) In response, Childs requested that Simpson provide the casino schedule to him via email or text message, and he would see what he could do for Simpson. (Tr. 160–162.) Simpson provided the schedule, but Childs did not

provide any further response to the request to be accommodated on his work schedule. (Tr. 161.)<sup>16</sup>

On September 18, 2015, the Respondent directed Simpson to take a break because he was required to work a mandated shift. (Tr. 164–165.) Simpson replied that he was unable to work the mandated shift. (Tr. 164–165.) At about 15 minutes before the end of that shift, Calumet Shift Supervisor Bridget Richards called him and told him he was needed to work the next shift. Simpson told her that he could not work that shift because he had to pick up his daughter and work his casino shift. (Tr. 163–166.) According to Simpson, about 5 minutes later, Manager Sherrod called him and told him he had to stay and work the mandated shift. (Tr. 166.) Simpson told him that he could not stay to work that shift, and that he already informed Supervisor Richards of that fact. Approximately 5 minutes later, Supervisor Donald Farrell announced over the radio that Simpson, along with other employees, was mandated for the next shift after taking their breaks. (Tr. 166.)

Richards then called Simpson back a second time to inform him he had to work the mandated shift, and Simpson said he would see if he could find someone to work his shift for him and Richards agreed, but he was unsuccessful in finding a replacement and told Richards he could not stay. She said OK and Simpson punched out at the end of his scheduled shift. (Tr. 167.) Simpson picked up his daughter, dropped her off at home, and went to work his scheduled shift at the casino which began at 4 p.m. (Tr. 167.) Later that day at around 5:30 p.m. while on break at the casino, Simpson retrieved a voice message on his phone from Manager Cottingham stating that Simpson had been suspended pending investigation, and directing him not to report for work for his next scheduled shift on September 20, 2015. (Tr. 168–169.)

On or about September 21, 2015, Human Resources Administrator James Wiser called Simpson and told him his employment had been terminated for “abandoning his post.” (Tr. 168–169.) Simpson asked if he could grieve his discharge, and Wiser said no, because it was signed by Fernandez and Operations Director Douglas Burke and he could not grieve it once they signed it. (Tr. 168–169.)

During the week of September 11, 2015, Simpson received a letter of termination from Respondent dated September 22, 2015, which stated he had been terminated effective September 18, 2015, his last day of work. (Tr. 169; GC Exh. 6.) That letter, signed by James Wiser, informed Simpson that his discharge was based on a “violation of Prohibited Conduct policy #13- Leaving the job during working hours without permission or abandonment of shift,” and “Specifically on September 18, 2015 you left work without receiving permission of your supervisor.” (GC Exh. 6.) That letter went on to provide that Respondent “considers this a voluntary quit, i.e., Job Abandonment.” (GC Exh. 6.) Simpson then began working full-time at the casino approximately 6 to 12 months after being discharged by the Respondent. (Tr. 181.)

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<sup>16</sup> During the trial, the Respondent stipulated that Emanuel Carter was no longer employed by the Respondent, but that during the period of time in question, he was a supervisor within the meaning of Sec. 2(11) of the Act. (Tr. 162.) In addition, the Respondent stipulated that Manager Childs was, at all material times, a supervisor and agent within the meanings of Sec. 2(11) and (13) of the Act, respectively.

Simpson testified that there were other employees who were unable to work their mandated shifts, but they were not discharged, such as: Anthony Periano, Danielle Boatwright, Jackie Chambers, and Shawn Hokes. (Tr. 170.)

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*b. The positions of the parties*

The General Counsel contends that the Respondent discharged Simpson because of his protected concerted picketing activity in violation of Section 8(a)(1) of the Act. The Respondent, however, argues that it was justified in discharging Simpson because he abandoned his shift.

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*c. Analysis*

Applying *Wright Line*, supra, the General Counsel has made a prima facie showing that Simpson's protected conduct was a "motivating factor" in the Respondent's decision to discharge him. The evidence establishes that Simpson was one of the lead organizers of the petitions that were submitted to management, and that he engaged in picketing on July 6, 2015, and that the Respondent was aware of his protected activities. While he covertly delivered the petition to management mailboxes at the facility, and while there is no evidence that anyone saw him deliver the petitions, Security Supervisor Dix observed him enter the building shortly before it was found in the mailboxes. In fact, Dix unlawfully interrogated him regarding his involvement with the petition. Simpson also hand delivered the petition to Supervisors Johnson and Wilson, who later told Simpson that management threw the petition in the trash. Simpson was also engaged in the picketing, carrying various signs complaining about the working conditions.<sup>17</sup> Simpson was also unlawfully interrogated by Supervisor Burton on July 5, 2015, regarding whether he would be involved in the picketing on the next day. The record establishes that after engaging in the picketing, Dix coercively informed him that Fernandez used the camera in the security control room to zoom in on the picketers, that she was taking down names and had a hit list, and that he should watch out, which constituted an unlawful threat of discipline or discharge. Thus, the record establishes that Simpson was engaged in protected concerted activity and the Respondent had knowledge of that activity.

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The record further establishes that Respondent harbored animus toward the protected concerted picketing activity as evidenced by the manager's statements that Fernandez was "pissed" and upset about the picketing, and that those employees were on hit lists and they would be disciplined or discharged. There is also direct evidence of animus toward Simpson in that Dix told him that Fernandez had a hit list of employees who picketed, and he should watch out. In addition, I find the timing of Simpson's discharge was suspect, as it occurred approximately 3 months after he engaged in the protected concerted activity. The Board may rely on the timing of the discipline relative to the employee's protected activity as support for an inference of unlawful motivation. *Mesker Door*, supra; See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

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<sup>17</sup> While Simpson was also involved in union activity by passing out union authorization cards for AFSCME to other employees, there is no evidence in the record to establish that the Respondent was aware of that union activity.

On such a showing, the burden shifts to the Respondent to demonstrate that Simpson would have been discharged even in the absence of the protected conduct. As mentioned above, showing a legitimate reason for the discharge is insufficient. Instead, Respondent must demonstrate by a preponderance of the evidence that Simpson would have been discharged even in the absence of his protected conduct. *Roure Bertrand Dupont, Inc.*, supra.

I find the record establishes that the Respondent's asserted reason for discharging Simpson was pretext for its unlawful motivation, and the Respondent failed to carry that burden. Simpson was assertedly discharged because he failed to work a mandated shift, which Respondent knew conflicted with his other job as a security guard at the casino, where he had been working since October 2014. Simpson provided his casino schedule to supervision before his shift with Respondent, in an effort to avoid conflicts in scheduling mandatory overtime. Despite the fact that in early 2015, Sherrod informed Simpson he could no longer accept lunches to accommodate him, in mid-August 2015, when Simpson sought to ensure that Respondent's increase in mandated scheduling did not conflict with his schedule at the casino, he had conversations with Supervisor Carter and Manager Childs about his schedule, and they both indicated an accommodation was possible and they would see what they could do.

When Simpson learned he was mandated on September 18, 2015, he informed both Sherrod and Supervisor Richard that he was unable to work that shift because he had to pick up his daughter at daycare and he was scheduled to work at the casino, but both told him he had to work. In addition, he requested to find a substitute or for some other accommodation, but was again told he had to work. He was not able to work the mandated shift and was discharged for abandoning his shift, and was denied an opportunity to grieve his discharge through Respondent's internal process.

Even though Simpson had an earlier infraction where he received a 2-day suspension for failing to work a mandated shift on May 7, 2015, it was not considered in his discharge. The Respondent only stated that his discharge was based on his failure to work a mandated shift on September 18, 2015, and made no mention that it was based on that previous infraction. Thus, he was discharged on the basis of that one infraction for missing the mandated shift.

Despite the fact that Simpson was discharged based on that one mandation infraction, the General Counsel presented evidence that other employees who committed one mandated infraction received lesser discipline from the Respondent. In that regard: (1) youth worker Danielle Boatwright received a written reprimand on June 22, 2016, for abandoning her mandated shift on May 20, 2016, rather than being discharged. (GC Exh. 57); (2) youth worker LaTonya Hewitt also was not discharged, but instead received a written reprimand on June 25, 2016, for walking off the job on June 24, 2016, stating that she "wasn't going to be able to stay for the shift." (GC Exh. 59.); (3) youth worker Phillip Timms was issued a written discipline on June 28, 2016, for abandoning his mandatory shift by walking off the job on June 25, 2016. (GC Exh. 62.); (4) youth worker Brandon Dann was issued a 2-day suspension on July 1, 2016, for refusing to report for his mandated shift on June 26, 2016, and he was also found to have been insubordinate and used abusive language while exiting the building. (GC Exh. 63.); (5) youth worker Nicole Ndjebo was issued a written discipline on October 5, 2016, for refusing to work her mandated shift on September 20, 2016. (GC Exh. 69.); and (6) youth worker Damon

Singleton was issued a written reprimand on November 15, 2016, and not discharged, for abandoning his mandated shift on November 14, 2016. (GC Exh. 71.).

In addition, despite the fact that Simpson was discharged based on that one mandated infraction, the General Counsel presented evidence that other employees who missed mandation on more than one occasion had not been discharged by the Respondent. In that connection, youth worker Jason Pritchett was disciplined by suspension on May 24, 2016, for missing a mandated shift on May 19, 2016, and he had an earlier infraction for missing a mandated shift on May 11, 2016, but he was not discharged. In addition, he had attendance policy infractions on May 20 and 21, 2016, and was not discharged. (Tr. 734-735; GC Exh. 49.) Likewise, Youth Worker Marshawn Mackie was suspended on December 3, 2015, for missing a mandated shift on December 2, 2015, and he was deemed a “no show.” He was not discharged even though that December 3, 2015 suspension showed he had two prior offenses for missing mandatory shifts on September 7 and 24, 2015. (Tr. 735; GC Exh. 37.) In addition, Mackie’s suspension reflected that he also had attendance infractions for reporting late to work on November 22, 23, 26, 29 and 30, 2015, and December 2, 2015, and was still not discharged. (GC Exh. 37) Furthermore, Youth Worker Darnisha Coy received a written reprimand on June 28, 2016, for failing to work a mandated shift on June 25, 2016 (Tr. 739-741; GC Exh. 61). Coy then received a suspension on October 21, 2016, for her second offense of missing her mandatory shift on October 20, 2016, and she was not discharged. (GC Exh. 70.)

The record thus establishes that the Respondent treated Simpson in a disparate manner so it could discharge one of the employees who had been a leader in the protected, concerted activities that were meant to better the employees’ working conditions. The Board may rely on, among other factors, disparate treatment of the affected employee as support for an inference of unlawful motivation. *Mesker Door*, supra; See *Embassy Vacation Resorts*, supra. Thus, the Respondent failed to rebut the General Counsel’s prima facie showing that Simpson was discharged for his engagement in protected concerted activities, and the Respondent discharged him in violation of Section 8(a)(1) of the Act.

### *B. The Alleged Violations of Section 8(a)(3) and (1) of the Act*

1. The Respondent’s issuance of written discipline to Tamika Kelley on September 24 and October 8, 2015<sup>18</sup>

#### *a. The facts*

Tamika Kelley drafted, circulated, and submitted to management the Lincoln petition by putting it in the management mailboxes. However, she did so covertly and she was not identified on that document as the person responsible for submitting it. There is also no evidence that the Respondent’s managers and supervisors had any knowledge of her involvement with the petition. As mentioned above, however, Kelley was one of the organizers of the employees’ protected

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<sup>18</sup> The complaint alleges that Kelley was issued written discipline on September 24 and October 10, 2015, but the evidence reflects that the second discipline is dated October 8, 2015, instead of October 10, 2015. (GC Exh. 18.)



concerted picketing activity, and as I have found above, she was unlawfully suspended for that picketing activity in violation of Section 8(a)(1) of the Act.

Kelley was also involved in the organizing for both the AFSCME and SPFPA unions by passing out union authorization cards and meeting with the union officials and the employees. There is, however, no evidence that the Respondent's management officials or supervisors were aware of her union activities.

On September 18, 2015, Respondent Manager James Crawford and Supervisor Kerwin Johnson notified Kelley that she would be transferred from Schedule C to Schedule A, and Lincoln Shift Supervisor Michael Caston provided her written notice of her transfer. (Tr. 271-272; GC Exh. 12.) In a conversation with Kelly, Caston told her that her transfer would become effective in 2 days. That transfer in shifts had the effect of changing Kelley's days off from Tuesdays and Wednesdays to Sundays and Mondays. (Tr. 272.) Kelley told Caston that the notice of schedule change was too short because she already scheduled personal leave for mandatory court appointments. (Tr. 272.) In that connection, Kelley even provided Johnson documentation of her scheduled court appointment, which was for September 23, 2015, at 8:30 a.m., and a doctor's note for her daughter which was for September 22, 2015. (Tr. 289; GC Exh. 20 and 21.) Kelley then requested to speak to Manager Crawford, whom Caston reported to.

On September 19, 2015, Kelley met with Crawford, Cason, and Supervisor Prince Fullerton, where she informed them that the schedule change was short notice and she did not have time to change prior scheduled court appointments. (Tr. 274.) Fullerton told her that he heard she would not sign her schedule change, and he told her that regardless of whether she signed it, her schedule was being changed. (Tr. 273-274.) About 3 hours later, Fullerton, Caston, and Crawford, along with Supervisor Moore, gave Kelley a written performance evaluation and asked her to review it, discuss any concerns, and sign it. (Tr. 274-275; GC Exh. 13.) Kelley reviewed the evaluation and took issue with it as being untrue. (Tr. 276.) Kelley testified that she asked those managers why she was still employed by the Respondent if her performance was so poor, and Fullerton replied that the purpose of the evaluation was to correct her performance. (Tr. 276.) Kelley responded that the evaluation was biased and prompted by her standing up for herself, and she stated that she would be filing a grievance. (Tr. 276.) On September 19, Kelley wrote a letter to Lincoln Facility Manager Oliver Cooper for the purpose of grieving her performance evaluation, and she submitted her grievance to Cooper by placing it in his mailbox at the Lincoln Facility. (Tr. 279; GC Exh. 14.) Kelley also hand-delivered a letter to Respondent's human resources department in order to document her concerns about the performance evaluation. (Tr. 278-281; GC Exh. 15.)

On September 21, 2015, Kelley contacted Lincoln Facility Manager Marlon Bradford by telephone and informed him she would not come to work on September 22 and 23, 2015, because she had the above-mentioned prior scheduled personal appointments. (Tr. 282.) Kelley informed Bradford that she had already met with Crawford, Caston, and Fullerton about her concerns, and Bradford said that Kelley should call back later to speak to Lincoln Shift Supervisor Clifford Judkins. (Tr. 282.) Kelley, however, said that she would not do that because she was informing Bradford of her call-off from work, and she subsequently did not report for work on either September 22 or 23, 2015. (Tr. 283.)

Shortly after Kelley arrived for work on September 24, 2015, Supervisor Kerwin Johnson notified her that she was suspended because of no-call/no-shows or her not calling-off from work on September 22 and 23, 2015. (Tr. 284.) Kelley informed Johnson about her earlier meetings with management, and that she called-off and spoke with Manager Bradford. (Tr. 284) Johnson responded that he did not “know of the situation,” and he gave her a written disciplinary action. (Tr. 284; GC Exh. 16.) That written discipline was based on Kelley’s alleged failure to call-off or report for work for her scheduled shifts on September 22 and 23 as a violation of Respondent’s “time and attendance policy.” (GC Exh. 16.) Kelley informed Johnson that she would file a grievance over that matter. (Tr. 284.) Later during that shift, Johnson issued Kelley a written “Corrective Action Plan” stating that she called-off from work one or more times in consecutive pay periods or being late one or more times also in a pay period. (Tr. 184–286; GC Exh. 17.)

Shortly thereafter, Kelley was contacted by Human Resources Generalist Mira Cronk who informed her that a meeting had been scheduled for October 1, 2015. (Tr. 286.) In that October 1st meeting, Kelley met with Human Resources Administrator Wiser, Cronk, Crawford, Cooper, and Bradford. Wiser invited Kelley to state her concerns, and she told them that her schedule change conflicted with her prior scheduled appointments, a four day vacation, and her coaching her daughter’s cheerleading team. (Tr. 287.) Wiser told her she was required to call-off for each day, and she replied that she previously met with Respondent and had called-off with Bradford on September 21, 2015. (Tr. 287.)<sup>19</sup> Kelley then told Cronk that she wanted to meet with Executive Director Fernandez because the meeting was going nowhere. (Tr. 288.) Cronk told her that she would contact Fernandez to schedule a meeting. After the meeting, Kelley was not returned to Schedule C, but Respondent reimbursed her by submitting her personal leave for September 22 and 23, 2015. (Tr. 288–289.)

On October 2, 2015, after no success in scheduling a meeting with Fernandez, Kelley hand-delivered a letter to Fernandez’ mailbox in the Lincoln Facility. (Tr. 289–291; GC Exh. 19.) The record reflects that Kelley met with Fernandez on October 8, 2015, to discuss her issues with the schedule change and the fact that Kelley had commitments already scheduled. (Tr. 625.) In that meeting, Fernandez reviewed the time and attendance policy with Kelley, and she admitted that Kelley’s schedule change occurred quickly and she empathized with Kelley’s position. (R. Exh. 14, at 36–40) Fernandez then changed the effective date for the schedule change to accommodate Kelley, but she did not change the decision to issue Kelley a written discipline.

The record, however, contains yet another discipline for Kelley that the Respondent provided to the NLRB during its investigation of the unfair labor practice charge, which was dated October 8, 2015. That discipline stated that Kelley was issued a “counseling” for calling-off on September 21, 2015 for her shifts on September 22 and 23, 2015. (GC Exh. 18.) Kelley

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<sup>19</sup> Kelley also noted her performance evaluation, which she considered to be biased and untrue. (Tr. 287.) Cooper informed Kelley that the reason her evaluation was low was because she interviewed for a supervisory position, and she was unfamiliar with that material. (Tr. 287.) Wiser told her that Crawford knew the material for the position better than she did, and Kelley responded that she was the one who trained Crawford. (Tr. 287.) When Kelley asked Crawford if he believed her evaluation was true, he just put his head down. The General Counsel, however, has not alleged that the issuance of the evaluation violated the Act.

testified that the October 8 counseling was never given to her by the Respondent, she had never seen it before the trial, and that she was unaware that her suspension was reduced to a “counseling.” (Tr. 291–293.) While the other disciplines admitted into the record in this case had been signed by management officials or supervisors, and usually by the employee who was the subject of the discipline, Kelley’s October 8 counseling/discipline was not signed by either management or her.

Kelley testified that with regard to these disciplinary actions, the Respondent never informed her that they had been rescinded, reduced to counseling, or removed from her personnel file. (Tr. 289–293.)

*b. The positions of the parties*

The General Counsel contends that the Respondent disciplined Kelley on September 24 and October 10, 2015, because of her engagement protected, concerted activity and union activity in violation of Section 8(a)(3) and (1) of the Act. The Respondent, however, argues that it was justified in disciplining Kelley because she failed to call-off to miss work on September 22 and 23, 2015. It also argues that the October 8, 2015, discipline in the record (GC Exh. 18) was drafted by the Respondent, but never issued to Kelley and therefore she was never issued discipline on that date.

*c. Analysis*

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by issuing discipline to Kelley for her engagement in protected concerted activities and Section 8(a)(3) and (1) for her engagement in union activities. Applying *Wright Line*, supra, the General Counsel has made a prima facie showing that Kelley’s protected, concerted activity was a “motivating factor” in the Respondent’s decision to discipline her. The evidence establishes, and I have found, that Respondent was aware of Kelley’s protected, concerted picketing activity, it harbored animus toward that protected activity, and it suspended Kelley because of her involvement in the picketing on July 6, 2015. Therefore, I find that the General Counsel made a prima facie showing that the disciplines issued on September 24, 2015, in the form of a written reprimand (GC Exh. 16) and Disciplinary Action Plan (GC Exh. 17) were motivated by her protected, concerted activity.

However, the Respondent argues that the Disciplinary Action Plan “counseling” dated October 8, 2015 (GC Exh. 18) should not be found to constitute unlawful discipline because it was never issued to Kelley. (R. Br., at 32) Instead, it argues that “someone typed up a document indicating Kelley would get a ‘Counseling’ for her failure to call-in on September 22 and 23,” but that document “was never issued.” (R. Br. at 32.) I find merit in that argument because that disciplinary form, unlike the others found in the record, was not signed by the Respondent’s management or supervisory officials, and it was not signed by Kelley nor did it contain a notation by Kelley that she read it but refused to sign it. In addition, Kelley testified that she had not received that document, and she had not seen it before the trial. Therefore, I do not find that she was issued discipline on October 8, 2015, in the form of Disciplinary Action Plan “counseling.” (GC Exh. 18.)

Even though I find that the General Counsel made a prima facie showing of discrimination for Kelley's protected concerted activities, I do not find that the General Counsel made a similar showing on the basis of her union activities under the General Counsel's theory that Respondent violated Section 8(a)(3) of the Act. In that connection, while the record establishes that Kelley was engaged in union activity and support for both AFSCME and SPFPA, there is no evidence that Respondent's management or supervisory officials had any knowledge of those activities. Therefore, I dismiss the allegation that the Respondent violated Section 8(a)(3) of the Act by disciplining Kelley.

On the showing of a prima facie case of discrimination for Kelley's protected concerted activities, the burden shifts to the Respondent to demonstrate that Kelley would have been issued the discipline even in the absence of the protected conduct. As mentioned above, showing a legitimate reason for the discipline is insufficient, and Respondent must instead demonstrate by a preponderance of the evidence that Kelley would have been disciplined even in the absence of her protected conduct. *Roure Bertrand Dupont, Inc.*, supra.

In this case, even though Kelley called-off of work on September 21, 2015, for her scheduled days of work on September 22 and 23, 2015, the Respondent issued her the written reprimand on September 24 for her failure to call-off for those scheduled shifts. (GC Exh. 16.) That same day it also issued her a Disciplinary Action Plan involving the same event for "calling off 1 or more times in consecutive pay periods." (GC Exh. 17.) The Respondent argues that its requiring call-offs for each day of absence was supported by the testimony of General Counsel witness, youth worker Ruth Crosby, who testified that Respondent's policy did in fact establish that employees were required to call in on every day that they were going to miss work, and Respondent's records showed that it disciplined employees for failing to call-off each day they were absent. (Tr. 495; R. Exh. 16.)

It is undisputed, however, that while the Respondent's time and attendance policy requires employees to call in on each day of absence, that policy does not require employees to call in each day of a multi-day absence when verification justifying the multi-day absence is supplied to the Respondent. In that regard, the policy specifically states:

Whenever an employee is going to be absent more than one day, they must contact their immediate supervisor each day, unless verification justifying the absence has been received and approved. (R. Exh. 14, p. 36.)

Based on this evidence, I find that Respondent failed to show that it had a legitimate basis to issue discipline to Kelley for failing to call-off for the September 22 and 23, 2015, absences. The evidence established that Kelley did call-off on September 21 for her absence on September 22, 2015, in accordance with the requirement that she call-off more than 3 hours ahead of time, and it is undisputed that she had the leave time available for that absence. Incredibly, the Respondent failed to offer any explanation for justifying the issuance of the written warning for the September 22, 2015 absence, when in fact Kelley had complied with the requirements and called-off for that day. In addition, under the Respondent's policy, she did not have to call in on September 23 for that day's absence because she supplied the Respondent with documentation of her scheduled court appointment on September 23, 2015, at 8:30 a.m., and a doctor's note for her daughter which was for September 22, 2015. (Tr. 289; GC Exh. 20 and 21.) Such documentation

constituted sufficient verification justifying the absences, and after receiving that documentation, the Respondent failed to inform her that it was in any way insufficient or that it would not be approved. Thus, Kelley did comply with the policy and correctly called-off for those two days of work, and the Respondent's asserted justification for the discipline is false and without merit.

The Respondent's issuance of discipline for those days was unlawful because providing false justification or no justification for issuing discipline for those day's absences supports an inference that Respondent had an unlawful motive for its actions that it wanted to conceal. *Pam American Electric*, 321 NLRB 473, 476 (1996); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). In addition, there was no credible justification for Respondent's issuance of its corrective action plan discipline on September 24, 2015, for the alleged infraction of calling-off more than 1 day in a pay period. Such discipline establishes a shifting reason for disciplining Kelley that supports an inference that its stated reason for the discipline was false. *Rogers Electric, Inc.*, 346 NLRB 508, 518 (2006); *Philo Lumber Co.*, 236 NLRB 647, 650 (1978).

I therefore find that Respondent did not carry its burden of showing that it would have issued discipline in the form of a written reprimand and corrective action plan to Kelley for her call-off on September 22 and 23, 2015, even in the absence of her protected concerted activity. Accordingly, I find that Respondent's issuance of such discipline on September 24, 2015, for her September 22 and 23, 2015 call-offs from work, violated Section 8(a)(1) of the Act.

### *C. The Alleged Violations of Section 8(a)(5),(3) and (1) of the Act*

1. On March 3, 2016, the SPFPA was elected, and subsequently certified, as the collective-bargaining representative of the Respondent's unit employees

In a representation election held in Case 07-RC-169521 on March 3, 2016, a majority of the votes cast were for the SPFPA (the Union). The Employer thereafter filed timely objections to the election. In a Decision and Certification of Representative issued by the Regional Director for Region 7 on March, 24, 2016, the objections were overruled, and the SPFPA was certified as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time armed and unarmed security officers, including direct care and youth workers performing guard duties as defined in Section 9(b)(3) of the Act, employed by the Employer at its facilities located at 300 Glendale and 1961 Lincoln, Highland Park, Michigan, but excluding, all office clerical employees, professional employees and supervisors as defined by the Act. (Jt. Exh. 4)<sup>20</sup>

The Respondent then requested review of the Regional Director's Decision. However, in an Order dated June 1, 2016, the Board denied the Respondent's request for review of the Regional Director's Decision and Certification of Representative. (Jt. Exh. 3.)

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<sup>20</sup> The Region issued an Erratum—Corrected Certification of Representative in Case 07-RC-169521 on August 17, 2016. (Jt. Exh. 2.)

In *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (November 22, 2016) (Jt. Exh. 7), the Board issued a Decision and Order in Case 07-CA-180451. In that related case, the Board found that on or about March 31 and July 1, 2016, the SPFPA Union, by letters, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit employees. Since on or about March 31, 2016, the Respondent failed to do so, contesting the Union's certification as the bargaining representative in the underlying representation proceeding.<sup>21</sup> Upon a charge and amended charges filed in that case, the General Counsel issued an amended complaint on September 8, 2016, alleging that Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following its certification. On October 4, 2016, the General Counsel filed a Motion for Summary Judgment and the Respondent admitted its refusal to bargain, but contested the validity of the certification of representative on the basis of its objections to the election.

In *Spectrum Juvenile Justice Services*, supra, the Board found that "[a]ll representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding," and that the Respondent failed to "adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." Id. at slip op. 1. On that basis, the Board found the Respondent had not raised any representation issue that was properly litigable in that unfair labor practice proceeding, and it accordingly granted the Motion for Summary Judgment. Thus, the Board found that the Respondent failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

2. In March 2016, after the SPFPA was chosen as the collective-bargaining representative of the unit employees, Respondent coercively informed employees that breaks between scheduled and mandated shifts would no longer be allowed because they voted for the Union, in violation of Section 8(a)(1) of the Act, and Respondent discriminatorily and unilaterally eliminated such breaks without bargaining or providing the Union an opportunity to bargain over that change, in violation of Section 8(a)(5), (3), and (1) of the Act

*a. The facts*

The record establishes that before the election in March 2016, the Respondent afforded employees breaks between their regular shifts and their mandated overtime shifts. Even though this practice was not in a written policy or rule, it was nevertheless a practice provided in the form of an unwritten policy. The duration of such breaks ranged from 30 to 60 minutes. In that regard, Atwater testified that the Respondent's policy with respect to breaks between employees' regular shift and mandated overtime shifts was to always allow what he estimated to be 45-60-minute breaks between those shifts. (Tr. 94-95.) On the shift that he worked (6 a.m.—2:00 p.m.) the residents would be locked in their cells from approximately 1:50 p.m. – 2:30 p.m., and the

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<sup>21</sup> I take official notice of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982); *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (2016).

managers would announce over the radios that the mandated employees were to take their breaks between the two shifts. (Tr. 96.) Calumet youth worker Danielle Boatwright testified that the policy was for 30–60-minute breaks between scheduled shifts and mandated shifts. (Tr. 464.) She stated that the managers would announce over the radios who would be staying over, and that they should take their break and then report to the pod. (Tr. 465.) In addition, Lincoln youth worker Ruth Crosby also testified that the employees were allowed a 30-minute break between their shifts and their mandated shifts. (Tr. 489.)

Executive Director Fernandez, however, testified that the Respondent never had a policy that allowed for breaks, and employees were not entitled to have breaks, even if they were mandated to work the following shift. (Tr. 592–593.) In that connection, she testified that Michigan State law only requires that employees under 18 years of age must be provided breaks, and none of the youth workers are under 18 years old. (Tr. 593–594.) She stated, however, that employees who felt the need to take a “break” could call their supervisor and ask for relief. Fernandez testified that in August 2014, she reiterated to the supervisors that employees were not allowed breaks, however, there is no credible evidence that Fernandez or any other management official informed the employees as such.

While Fernandez’ testimony regarding employee breaks between scheduled and mandated shifts conflicts with that of many of the employees who testified, I do not credit her assertions. As mentioned above, while I found that the General Counsel’s witnesses were credible, I conversely found that Fernandez was not a credible witness. I found her demeanor lacking in that she testified at times in an evasive manner and appeared to be less than candor. I also found her testimony implausible and unbelievable at times. Importantly, I note that her testimony about breaks was contradicted by the credible testimony of several of her former managers, who testified that Respondent did have a policy, albeit unwritten, of providing breaks for employees between their scheduled shifts and mandated shifts. Former Facility Manager Steven Johnson acknowledged that Respondent’s policy and practice was to provide breaks between scheduled and mandated shifts, and he testified that the duration of the breaks was approximately half-an hour. (Tr. 379.) Likewise, Security Supervisor Hionel Black confirmed that Respondent provided breaks for employees before working mandated shifts. (Tr. 442–443.) Thus, I do not credit Fernandez or any other Respondent witness who testified that employees were not provided breaks between their scheduled and mandated shifts of work.

While the credible record evidence establishes that the employees were provided breaks between their scheduled and mandated overtime shifts, after the election in March 2016, that policy or practice changed. Atwater testified that the Respondent’s policy for breaks changed in or around mid-March 2016, when managers told the mandated employees to return to the pods where they were working, and that there would be no more breaks. (Tr. 98–99.) Calumet Facility Manager Leroy Sherrod was one of the managers who conveyed the change in policy by telling employees who were usually allowed to take a break after their shift, to return to their pods where they were mandated. (Tr. 100.) Atwater testified that since that time, no breaks have been allowed for employees between their regular shifts and their mandated overtime shifts.<sup>22</sup>

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<sup>22</sup> The Respondent argued that since Atwater stated in his affidavit to the Government that the change in mandation breaks occurred in mid-February 2016, rather than mid-March as he testified to at trial, I should discredit his testimony. As mentioned above, I found Atwater to be a very credible witness, and I

(Tr. 100–101.) Youth Worker Danielle Boatwright also testified that in March or April 2015, both Sherrod and Manager Childs informed her that there would be no more breaks allowed at the Calumet facility. (Tr. 464–465.) Calumet Youth Worker Kalaundra Hall also testified that while they were allowed 30-minute breaks between shifts, after the union election they were no longer allowed such breaks. (Tr. 500–502.) Likewise, Youth Worker Ruth Crosby testified that she was informed by management that there would no longer be breaks between shifts allowed at the Lincoln facility. (Tr. 490.)

Quiana Jenkins also testified that prior to the NLRB representation election on March 3, 2016, the Respondent’s policy was to allow employees a break (approximately 30 minutes) between their scheduled shift and mandated shift in order to get food or run errands. (Tr. 219.) According to Jenkins, in April 2016, shortly after the election, that policy changed when Respondent no longer allowed for breaks between shifts. Instead, the employees were required to report directly to the pod for their mandated overtime shifts. (Tr. 219–222.) While that change in policy was not formally announced, distributed in writing, or posted for employees by the Respondent, Jenkins testified that Sherrod informed employees through the company radios that staff was no longer allowed such breaks and they had to report to their assigned pods for the overtime shifts. (Tr. 220.)

In regard to this change in policy and practice, Jenkins testified that in a discussion she and other employees had with Sherrod, an employee asked Sherrod “what’s up with us not being able to take a break to get food or anything else,” and Sherrod stated that “you guys voted the Union in, so we have to follow the rules...no one can take breaks.” (Tr. 220–221.) The General Counsel alleges that Sherrod’s statement regarding no breaks because the employees voted the union in violated the Act. I find merit in that assertion. Sherrod’s statement to employees that the reason they could no longer take breaks between shifts was because they voted in the Union was coercive and would reasonably tend to interfere with their rights under the Act to elect a union as their collective-bargaining representative. I therefore find that Sherrod’s statement informing employees that breaks would no longer be allowed because they voted for the Union was coercive and a violation of Section 8(a)(1) of the Act.

Furthermore, with regard to Respondent’s elimination of breaks, SPFPA Vice President Mark Crawford testified that at the time he became aware the Respondent eliminated the breaks between the scheduled and mandated shifts, the Respondent failed to provide either he or the Union notice of such a change in working conditions, and it did not provide the Union any opportunity to bargain over that change. (Tr. 38–39.) SPFPA Local 120 Union President Terrance Worthen likewise testified that when he became aware that Respondent eliminated the breaks between scheduled and mandated shifts, the Respondent had not provided the Union with any opportunity to bargain over that change in working conditions. (Tr. 63–64.)

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find the 1-month difference in his assertion as to the timing of the change in policy is inconsequential and did not detract from his very credible demeanor at trial and the fact that he appeared honest in character and testified in a very convincing and truthful manner.



*b. The positions of the parties*

The General Counsel argues that Respondent's removal of the breaks was a unilateral change made without providing the union an opportunity to bargain, and that it was motivated by the Respondent's antiunion animus, in violation of Section 8(a)(5), (3) and (1) of the Act. The Respondent argues that it has never allowed breaks and therefore there was no change in policy, and that even if it was a change, it had no duty to bargain because the Union was not properly certified as the representative of the employees.

*c. Analysis*

It is well established that unilateral changes by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has held that a unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), modified 337 NLRB 1025 (2002); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). The Respondent's policy or practice of allowing for employee breaks between their scheduled and mandated shifts, despite not being provided for in writing, was nevertheless a mandatory subject of bargaining. That policy or practice was also material, substantial, and significant as it significantly impacted employees' conditions of work.

The credible record evidence establishes that Respondent changed that policy or practice after the union won the election, and it is undisputed that the Respondent failed to bargain with the union over that change. I find that the Respondent was obligated to provide the union an opportunity to bargain over that change, and upon request, bargain over the removal of those breaks. Instead, Respondent implemented the change in policy and practice, announcing it verbally and directly to the employees as a fait accompli, even going so far as to blame the Union for the loss of that term and condition of employment. The Board has found that notifying employees directly of a unilateral change and demonstrating a fixed position to implement the changes as announced are indicative of a fait accompli, and thus evidence of an unlawful unilateral change. *S & I Transportation, Inc.*, 311 NLRB 1388 (1993). Respondent's failure to bargain over this unilateral change in this matter constitutes a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

This restriction on employers that prohibits unilateral changes applies in this context where the Union won a Board conducted election and the Respondent subsequently made unilateral changes while the election objections were pending, and the final determination had not been made. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975); *Flambeau Airmold Corp.*, supra. The Respondent in this case, however, also continued to contest the Union's status as the bargaining representative despite the fact that the Board has found the Union is the exclusive collective-bargaining representative of the unit employees. *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (2016). Under such circumstances as this, the Respondent "acts at its own peril in making [such] changes in terms and conditions of employment," and its actions constitute a violation of Section 8(a)(5) and (1) of the Act. *Mike O'Connor Chevrolet*, supra; *Flambeau Airmold Corp.*, supra.

I further find that Respondent's timing and unilateral implementation of this change in policy and working conditions, as shown by Sherrod's unlawful and coercive statement to employees that the breaks were eliminated because the employees voted for the Union, establishes that it was motivated by unlawful considerations, namely the employees' efforts to vote the Union in as their collective-bargaining representative. As such, the Respondent's unilateral elimination of such breaks also constituted a violation of Section 8(a)(3) and (1) of the Act.

3. On April 2016, the Respondent discriminatorily and unilaterally required part-time contingent employees to work mandated overtime shifts without bargaining or providing the Union an opportunity to bargain over that change, in violation of Section 8(a)(5), (3), and (1) of the Act

*a. The facts*

Atwater testified that the Respondent compiled a daily "mandation list" with the names of employees who were required to work the next shift due to employees calling-off on that shift. Every day a supervisor or manager would call out the names of those mandated employees over the radios for all agency employees. (Tr. 91-93.) Full-time employees could be "mandated" or required to work overtime hours on the following shift to ensure the shift was adequately staffed with youth workers. Contingent employees are part-time employees who could voluntarily work overtime hours if they desired, but they could not be required or mandated to work those shifts. (Tr. 90.)

Quiana Jenkins, a contingent part-time youth worker who started working at the Respondent's facility on August 10, 2015, credibly testified that shortly after being hired she had conversations with Calumet Facility Manager Leroy Sherrod and Manager Cottingham, who informed her that contingent workers were able to create their own schedules and choose the days they worked. (Tr. 214-215.) She testified that mandated overtime was when an employee was required to stay and work an additional shift due to the fact that someone had called-off of work. (Tr. 215.) Calumet Shift Supervisor Maurice Dillard, Sherrod, and Cottingham had all informed her that contingent employees could volunteer to work overtime, but they could not be required to do so. (Tr. 215.) Jenkins testified that when she declined offers to work overtime, she was never penalized or disciplined for doing so. (Tr. 218.)

Despite the fact that Fernandez claimed there was never a written policy or rule stating that part-time contingent employees could not be mandated (Tr. 652), several of Respondent's managers and supervisors confirmed that Respondent's policy was that contingent employees could not be mandated for overtime. In that connection, Facility Manager Steven Johnson acknowledged that under Respondent's policy, contingent employees could not be mandated. (Tr. 379.) Security Supervisor Hionel Black also acknowledged that Respondent's policy was that contingent employees could be asked to work overtime, but they could not be mandated to do so. (Tr. 445-447.)

The record establishes that after the union election in March 2016, the Respondent's policy changed with regard to requiring part-time contingent employees to work mandated overtime shifts. Jenkins testified that Calumet Shift Supervisor Larry Edwards told her in mid-

April 2016, that Fernandez said all contingent employees could now be mandated and that Sherrod had spoken to the all the contingent employees about that change. (Tr. 222–223) Calumet youth worker Danielle Boatwright also testified that the policy for contingent employee mandation changed after the election, because in April 2016, Sherrod told her “now contingents are getting mandated too.” (Tr. 462–463.) Boatwright also talked to Kerphinas Stewart the next day, who told her “everybody [is] getting mandated now.” (Tr. 464.) She testified that Managers Childs and Cunningham also said the same thing. (Tr. 464.) Consistent with that change in policy, from April to September 2015, Boatwright was mandated to work overtime even though she was a contingent employee. (Tr. 467.)

In addition, Atwater testified that after the NLRB election he started hearing the names of contingent employees being called by management to work mandated shifts, and some of those employees who considered him a contact person for the Union, asked him why they were being mandated when they had not volunteered. (Tr. 91–93.) In response, Atwater told employees that since the Union won the election, there should not be changes to Respondent’s policies unless mutually agreed-upon by the Company and the Union. (Tr. 93.) However, Atwater testified that after the Respondent instituted the policy of mandating overtime for contingent employees, to his knowledge the Respondent never informed the Union that it was going to make that change in policy. (Tr. 94.) SPFPA Union Official Worthen also testified that the Respondent never bargained with the Union, nor provided it notice or an opportunity to bargain over the change in requiring contingent employees to work additional mandated shifts. (Tr. 64.)

*b. The positions of the parties*

The General Counsel argues that Respondent’s change in requiring contingent employees to work mandated overtime shifts was a unilateral change made without providing the union an opportunity to bargain over it, and that it was motivated by the Respondent’s antiunion animus. The Respondent argues that it has never had a policy that allowed contingent employees to be excluded from being required to work mandatory overtime shifts, and that its records show some contingent employees have worked overtime in the past, therefore there was no change in policy. (R. Br. p. 24–25.) In addition, it argues that even if it did institute that change in policy, it is not obligated to bargain with the Union because the Union was not properly certified as the representative.

*c. Analysis*

Despite the fact that Respondent does not have a written policy or rule stating that part-time contingent employees could not be mandated, the credited testimony of the employees and the Respondent’s former managers establishes that the Respondent’s policy or practice was that contingent employees could not be mandated to work overtime shifts. The Respondent’s argument that its records show some contingent employees worked mandated overtime shifts before the election in March 2016 constitutes evidence that such a policy did not exist, is not entitled to any weight. I find no merit in that contention because the record establishes that contingent employees have always been able to voluntarily work overtime hours and shifts, and they have done so. However, they could not be required to do so by the Respondent. Those records referenced by Respondent do not establish that those contingent employees who worked mandated overtime shifts were actually forced to work them, and instead they could have

voluntarily worked them. In that regard, Human Resources Administrator James Wiser acknowledged that, concerning the records in question, the contingent employees could have volunteered to work those mandated shifts, which was not noted on those documents. (Tr. 737-738; R. Exh. 17) Thus, I find that the Respondent maintained an unwritten policy or practice that part-time contingent employees could not be required to work mandatory or mandated overtime shifts.

As mentioned above, the Board has established that unilateral changes by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are regarded as per se refusals to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). The credible record evidence establishes that the Respondent maintained a policy or practice of not requiring part-time contingent employees to work mandatory or mandated overtime shifts, and that policy/practice was clearly a term and condition of employment and a mandatory subject of bargaining. “Employee work rules and particularly those that can lead to disciplinary actions constitute mandatory subjects of bargaining.” *Randolph Children’s Home*, 309 NLRB 341, 343 at fn. 3 (1992); *Flambeau Airmold Corp.*, supra 173. The record establishes that Respondent changed that policy or practice after the union won the election, and it is undisputed that the Respondent failed to bargain with the union over that change. That change was certainly “material, substantial, and significant” in that it constituted a substantial change in their working conditions.

I find that the Respondent had an obligation to notify the Union of its desire to make that change, to provide the union an opportunity to bargain over that change, and upon request, bargain over it. Instead, Respondent implemented the change in policy by announcing it verbally and directly to the employees as a fait accompli. *S & I Transportation, Inc.*, supra. The Respondent’s unilateral change requiring contingent employees to work mandated overtime, made without bargaining with the Union and without providing the Union an opportunity to bargain over that change, constituted an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

As mentioned above, the Respondent has contested the SPFPA’s status as the exclusive collective-bargaining representative of the unit employees, despite the fact that the Board determined it is the exclusive collective-bargaining representative. *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (2016). In that regard, it has argued that since it “does not accept that the SPFPA is the collective-bargaining representative of its [youth workers] and security workers, it would be illegal for it to recognize the union and/or to negotiate with it as to the terms and conditions of employment for that Unit.” (R. Br. at 26) Respondent’s failure to bargain over this unilateral change regarding mandated overtime for contingent employees is thus consistent with that unlawful position, and it “acts at its own peril” by committing a violation of Section 8(a)(5) and (1) of the Act.

In addition, I find that Respondent implemented this change in policy because the employees selected the Union as their collective-bargaining representative. Respondent’s timing and unilateral implementation of this change in policy are evidence that it was motivated by unlawful considerations, namely the fact that the employees’ elected the Union as their collective-bargaining representative, in violation of Section 8(a)(3) and (1) of the Act.

4. On June 1, 2016, as a result of its unlawful unilateral change in requiring part-time contingent employees to work mandatory overtime shifts, the Respondent discharged employee Quiana Jenkins in violation of Section 8(a)(5) and (1) of the Act

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*a. The facts*

10 Quiana Jenkins started her employment with Respondent as a contingent part-time youth worker on August 10, 2015. Her immediate supervisor was Bridget Richards, Calumet's shift supervisor. (Tr. 212.) As mentioned above, Jenkins was informed that as a part-time contingent employee, she could not be required or mandated to work overtime shifts. However, after the union election, the Respondent informed contingent employees that they would be required to work mandated overtime shifts, and in mid-April and again on April 29, 2016, Jenkins was mandated for overtime. When she informed Supervisor Edwards that she could not work the mandated shift because she had to pick up her child, he informed her that if she did not work her  
15 mandated overtime shift, she could be discharged for abandoning her shift. (Tr. 223-224.)

20 Jenkins testified that she was notified on May 6, 2016, that she was being mandated for the next shift, but she informed management that she could not work that shift because she had to get her child, and she left work after her scheduled shift. (Tr. 223-224.) The Respondent issued her a "Disciplinary Action Plan" written reprimand dated May 10, 2016, which described the "problem" as: "On the afternoon of May 2016 Youth Worker Ms. Quiana Jenkins was informed that she would be mandated for coverage on the afternoon shift (she refused to accept mandating); stated that she cannot stay, due to not having a baby sitter. This was the cause and effect, for the next person in rotation to get mandated." (GC Exh. 8.) The rule, policy, or  
25 procedure which was violated was described as: "Prohibited Conduct #8 Insubordination, which includes the failure or refusal to obey instructions of supervisory staff; Prohibited conduct #13 Leaving the job during work hours without permission or abandonment of shift." Finally, the disciplinary document stated that Jenkins did not have any previous disciplinary or corrective actions for the same violation. (GC Exh. 8.)  
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35 On May 27, 2016, Jenkins was again called for mandated overtime, but informed Calumet Shift Supervisor Maurice Dillard that she could not work an overtime shift because she had to pick up her children. Jenkins testified that Dillard told her "OK," and Jenkins left work after her scheduled shift. (Tr. 226-228.) However, on May 30, 2016, when Jenkins came to work, Sherrod told her not to clock in, and to come back to work at 10:00 to see human resources. (Tr. 229.) Jenkins returned to work and went to the human resources department where she met with Human Resources Administrator James Wiser. (Tr. 230.) Jenkins testified that Wiser told her it was her second instance of not staying for mandated overtime and "that its possibly termination." (Tr. 230.) Jenkins responded that she had worked there for 9 months and  
40 had not been written up, and he told her he would have to speak to Fernandez and call her back. He further informed Jenkins that Fernandez told her before that if she missed mandation she could be terminated, but Jenkins told him that Fernandez never told her that. (Tr. 231.) Later that afternoon, Wiser called Jenkins and told her that her employment was terminated. (Tr. 232.)

45 The Respondent issued Jenkins a discharge letter dated June 2, 2016, which informed her that she was terminated effective May 27, 2016 (her last day worked), for violation of "Prohibited Conduct policy #13—Leaving the job during working hours without permission or

abandonment of shift. Specifically on May 27, 2016 you left work without receiving permission from your supervisor.” That letter, signed by Wiser, informed Jenkins that the Respondent considered her “a voluntary quit, i.e. Job Abandonment.” (GC Exh. 10.)<sup>23</sup>

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*b. The positions of the parties*

The General Counsel argues that Respondent’s discharge of Jenkins was pursuant to and the result of its unlawful unilateral change in requiring contingent employees to work mandated overtime shifts in violation of Section 8(a)(5) and (1) of the Act. The Respondent argues that it was justified in discharging Jenkins and therefore did not violate the Act.

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*c. Analysis*

As mentioned above, the Respondent unlawfully, discriminatorily, and unilaterally implemented its change in requiring contingent employees to work mandatory overtime in violation of Section 8(a)(5), (3), and (1) of the Act. While previously the Respondent’s contingent employees were not required to work mandated overtime, and they would not be disciplined if they were unable to work overtime, the Respondent changed that policy and discharged Jenkins for that infraction. On May 27, 2016, she left work after her completing her scheduled shift because she could not work the mandated overtime shift that Respondent now required, and she was discharged for an attendance violation for “leaving the job during working hours without permission or abandonment of shift” as a result of that unlawful unilateral change. (GC Exh. 10.)

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The Board has held that employees disciplined or terminated as a result of an employer’s unlawful unilateral change constitute violations of Section 8(a)(5) of the Act. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001), modified 337 NLRB 1025 (2002); *Consec Security*, 328 NLRB 1201 (1999); *Great Western Produce, Inc.*, 299 NLRB 1004 (1990); See, e.g., *Windstream Corp.*, 352 NLRB 44, 44 (2008) (held any employees terminated as a result of employer’s unlawful unilateral change violated Sec. 8(a)(5) of the Act). In *Great Western Produce*, supra, the Board held that certain discharges were violative of Section 8(a)(5) because they resulted from the unilateral promulgation of a rule. In that case, the Board stated:

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The *Wright Line* analysis is applied to alleged violations of Section 8(a)(3). The focus of such an analysis, i.e., whether the employer would have discharged the employee even absent the employee’s protected concerted activity, is on the employer’s interference with the employee’s Section 7 rights. In contrast, the focus of the analysis of a discharge alleged to constitute a refusal to bargain in violation of Section 8(a)(5) must be on the injury to the union’s status as bargaining representative. An employer that refuses to bargain by unilaterally changing its employees’ terms and conditions of employment damages the

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<sup>23</sup> Jenkins testified that with the discharge letter she received another letter from Fernandez dated May 31, 2016, regarding “meetings on grievance follow-up,” which pertained to Jenkins’ grievances she submitted to Respondent regarding grievances submitted April 7 and April 29, 2016, addressing interactions between Jenkins and Facility Manager Sherrod and in response to a written discipline for walking off a mandatory overtime shift on May 10, 2016. (GC Exh. 9.)

union's status as the bargaining representative of the unit employees. That status is further damaged with each application of the unlawfully changed term or condition of employment. No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition.

We shall continue to apply the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5): If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5). *Great Western*, 299 NLRB at 1005.

Since the Respondent discharged Jenkins pursuant to the unlawfully implemented change in policy requiring contingent employees to work mandated overtime, when in fact she notified her supervisor that she was unable to work that overtime shift, Respondent unlawfully discharged her in violation of Section 8(a)(5) and (1) of the Act. *Consec Security*, supra at 1203-1204; *Randolph Children's Home*, 309 NLRB 341 (1992).

5. On March 29 and July 1, 2016, the Respondent failed and refused to provide information requested by the Union that was necessary and relevant to its duties as collective-bargaining representative of the unit employees, in violation of Section 8(a)(5) and (1) of the Act

*a. The facts*

As the Board referenced in its decision in *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (2016), the SPFPA Union made written requests that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. *Id.* slip op. at 1-2. The undisputed evidence in the instant case establishes that the Union's requests to bargain were by letters dated March 29 and July 1, 2016. (Jt. Exhs. 5 and 6) International SPFPA Union President David Hickey attached identical requests for information to those requests for bargaining, which stated as follows:

On behalf of the International Union, Security, Police & Fire Professionals of America (SPFPA), I take this opportunity to initiate [a] cooperative labor/management relationship with your company.

In an effort to expedite the negotiations process, we request the following information of the security workforce, which we have been certified to represent.

For all Employees at the above mentioned worksite: names, seniority, rank, hourly wages, mailing address, and phone.

Contact Information if applicable: GSA or Delegated Solicitation Number, anniversary date, copy of wage determination.

General Information on Company: organization chart, employee's handbook, worksite operating procedures including description of posts and hours of operation.

- 5        Benefit Package, summary plan description (H & W/ 401(k)), summary of benefits and coverage (SBC) for each plan offered.

10        Please forward the requested information to our Region 1 Vice President, Mark Crawford at 25510 Kelly Road, Roseville, MI 48066 or email; [mcrawford@spfpa.org](mailto:mcrawford@spfpa.org).

15        According to Mark Crawford, the SPFPA's vice president of Region 1, the SPFPA Local 120 is part of Region 1 of the SPFPA International Union, and he is responsible for organizing, negotiating collective-bargaining agreements, and handling grievances. He testified that the March 29 and July 1 letters were the standard letters the SPFPA sends out to begin bargaining after being certified as the representative, and that the information requested was relevant to the Union's desire to commence bargaining. (Tr. 26-31.) The March 29 letter and information request was sent certified mail to the Respondent, and the United States Postal Service delivered the letter/request for information to Fernandez on March 31, 2016. (Tr. 28; Jt. Exh. 5.) Crawford testified that after sending the March 29 letter/request, the Union did not receive a response, a request to clarify the information sought, or a request to narrow the request for information from the Respondent. (Tr. 31-32.) Crawford testified that around mid-April 2016, within 2 weeks of sending Respondent the March 29 letter/request, he called Fernandez and left a message asking her to return his call. However, she never did so, and the Respondent failed to provide the Union with any possible dates to commence the negotiations. (Tr. 35-37.)

30        Crawford then sent the same demand for bargaining and request for information to the Respondent on July 1, 2016, because the Union did not receive a response to the March 29 letter. (Tr. 32-33.) Crawford testified that he likewise did not receive a response to the July 1 letter requesting bargaining and information, and approximately one week after sending that letter (on or about July 7), he called Fernandez and left another message for her to contact him, but she never returned that call either. (Tr. 36-37.)

35        SPFPA Local 120 President Terrance Worthen testified that after receiving the Board's Order denying Respondent's request for review of the Regional Director's Decision and Certification of Representative dated June 1, 2016 (Jt. Exh. 3.), he called Fernandez on July 11, 2016, to schedule times for contract negotiations, but she was not there and he did not leave a message. (Tr. 51-54.) Worthen then called Fernandez again on July 13 and 19, 2016, and left messages for her requesting that she contact him for bargaining, but she never responded. (Tr. 40 55-56.) Later in the afternoon of July 19, 2016, he called Respondent's counsel and representative, Sheryl Laughren, and left a message. She called him back on July 21 or 22, 2016, and he told her that he was trying to reach Fernandez to begin contract negotiations, and he requested Laughren's assistance in reaching Fernandez. (Tr. 57-58.) He testified that Laughren informed him that she would check with the Respondent and get back to him, but she never did, and Fernandez never contacted him. (Tr. 59.)



*b. The positions of the parties*

The General Counsel alleges that the Respondent violated the Act by failing to provide the Union with the information it requested. The Respondent admitted in its answer to the complaint that it received the SPFPA's written information requests of March 29 and June 1, 2016, and that it failed to provide the information requested. (Tr. 44-45; Jt Exh. 5, GC Exh. 1(oo).) Although the Respondent denied that the information the Union requested was necessary and relevant to the Union's performance of its duties as the representative of the employees, it offered no evidence or argument to support its assertion that the information was not necessary or relevant. The Respondent provided no defense to this allegation other than its determination that the election was not properly conducted and the Union was therefore not properly certified as the employees' collective-bargaining representative. (R. Br. at 48-49)

*c. Analysis*

It is well settled that an employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer's employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); see also *Central Soya Co.*, 288 NLRB 1402 (1988). This duty applies to contract negotiations and extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* at 437.

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. In this case, the information the Union requested, such as names, hourly wages, addresses, organizational charts, employee handbooks, benefit packages, and worksite operating procedures, is presumptively relevant and it is necessary for the Union to negotiate an initial collective-bargaining agreement with the Respondent. *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996). The Board has held that when information "has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party." *House of Good Samaritan Medical Facility*, 319 NLRB 392, 397 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992). The Respondent has made no such showing in this case.

Instead, as mentioned above, the Respondent provided no defense to this allegation other than its assertion that it could not bargain with the Union or provide the information requested because the election was not properly conducted and the Union was not properly certified as the bargaining representative. (R. Br. at 48-49.) That argument, however, is without merit, as the Board has already decided that issue. As mentioned above, the Board held in *Spectrum Juvenile Justice Services*, 364 NLRB No. 149 (2016), that all representation issues raised by the

Respondent were or could have been litigated, and it failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

Based on the above, I find that the Respondent's actions constitute a failure and refusal to bargain and to provide the Union with the requested information, which was relevant and necessary for its duties as the exclusive collective-bargaining representative of the unit employees, in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, Spectrum Juvenile Justice Services is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the AFSCME, SPFPA, and SPFPA Local 120 have been labor organizations within the meaning of Section 2(5) of the Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by: unlawfully interrogating employees regarding their engagement in, sympathy for, and support of protected, concerted activities; engaging in surveillance of employees' protected concerted activities; threatening employees with discipline for engaging in protected, concerted activities; creating the impression that employees' protected concerted activities are under surveillance; threatening employees with discipline for engaging in protected, concerted activities; threatening employees with discipline for engaging in protected concerted activities; unlawfully interrogating employees regarding their union and protected activities; and coercively informing employees that breaks would no longer be allowed because they chose the Union as their collective-bargaining representative.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by: suspending Sherman Cochran, Tamika Kelley, and Delaine Singleton-Green; discharging Alfred Neely; and discharging Lamont Simpson.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by disciplining Tamika Kelley with a written reprimand on September 24, 2015, for her failure to call-off for her scheduled shifts on September 22 and 23, 2015.

5. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act by: unilaterally eliminating breaks between scheduled and mandated shifts of work and requiring part-time contingent employees to work mandated overtime shifts, without bargaining with the Union or providing the Union an opportunity to bargain over those changes in employees' terms and condition of employment.

6. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by, as a result of its unlawful unilateral change requiring part-time contingent employees to work mandated overtime shifts, discharging Quiana Jenkins.

7. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by on or about March 29 and July 1, 2016, refusing to recognize and bargain with the Union and by failing and refusing to provide the Union with information it requested that was

relevant to, and necessary for, its duties as the collective-bargaining representative of the Respondent's bargaining unit employees.

8. The above unfair labor practices affect commerce with the meaning of Section 2(2), (6), and (7) of the Act.

9. The Respondent has not otherwise violated the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, by unlawfully disciplining Tamika Kelley on September 24, 2015, shall be ordered to rescind that discipline in the form of a written reprimand for her failure to call-off for her scheduled shifts on September 22 and 23, 2015, and to provide Kelley with written notice that said discipline has been rescinded and removed from her personnel files. The make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971).

The Respondent, by unlawfully suspending Sherman Cochran, Tamika Kelley, and Delaine Singleton-Green for their engagement in protected, concerted activities, shall be ordered to make them whole, if that has not already been done, for any loss of earnings and other benefits he may have suffered as a result of the discrimination against them. The Respondent, by unlawfully discharging Alfred Neely, Lamont Simpson, and Quiana Jenkins, shall be ordered to offer them reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.

As the violations for Sherman Cochran, Tamika Kelley, Delaine Singleton-Green, Alfred Neely, Lamont Simpson, and Quiana Jenkins involve cessations of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Cochran, Kelley, Singleton-Green, Neely, Simpson, and Jenkins for the adverse tax consequences, if any, of receiving a lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 7 a report allocating the backpay awards to the appropriate calendar years for said employees. The Regional Director will then assume responsibility for transmission of the reports to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Cochran, Kelley, Singleton-Green, Neely, Simpson, and Jenkins for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also be ordered to expunge from its files any and all references to the unlawful suspensions of Cochran, Kelley, and Singleton-Green, and unlawful discharges of Neely, Simpson, and Jenkins, and notify them in writing that this has been done and that evidence of the discriminatory and unlawful actions will not be used against them in any way.

The Respondent shall ordered to make unit employees whole for losses they may have sustained as a result of Respondent's unilateral changes to its policies and practices, such as requiring part-time contingent employees to work mandated overtime shifts, including losses sustained by unit employees who may have been discharged, suspended, or otherwise disciplined under these unlawful unilateral changes in policies or practices. See *Salem Hospital Corp.*, 360 NLRB 768, 768 fn. 1 (2014); *Crittenton Hospital*, 342 NLRB 686, 697 (2004); *Laurel Baye Healthcare*, 352 NLRB 179 (2008), vacated and remanded 564 F.3d 469 (D.C. Cir. 2009), cert. denied 130 S.Ct. 3498 (2010), affd. 355 NLRB 599 (2010). For unit employees who may have been separated from employment under the unilateral changes in policy and practice, backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra. For unit employees who may have otherwise been disciplined as a result of the unlawful unilateral changes in policy and practice, the make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). For both groups of unit employees, the remedy shall include interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall be ordered to compensate affected employees for the adverse tax consequences, if any of receiving a lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, supra, the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 7 a report allocating the backpay awards to the appropriate calendar years for said employees. The Regional Director will then assume responsibility for transmission of the reports to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, in accordance with *King Soopers, Inc.*, supra, Respondent shall also compensate those affected employees for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also be ordered to expunge from its files any and all references to the unlawful disciplines, suspensions, or discharges of such affected employees, and notify them in writing that this has been done and that evidence of the discriminatory and unlawful actions will not be used against them in any way.

With regard to employees affected by the Respondent's unlawful unilateral changes in policies and practices, I note that the Board has broad discretion to fashion an appropriate remedy, and it is within its discretion to order reinstatement and make-whole remedies even where there have been no employees identified as having been disciplined, suspended, or

discharged as a result of the Respondent's unlawful unilateral changes. *Salem Hospital Corp.*, 360 NLRB 768, 768 fn. 1 (2014); See, e.g., *Windstream Corp.*, 352 NLRB 44, 44 (2008) (ordering reinstatement and make-whole remedy in the event that any unit employee had been terminated as a result of the employer's unlawful unilateral change), reaffirmed and incorporated by reference 355 NLRB 406, 406 (2010); *Uniserv*, 351 NLRB 1361, 1362 (2007) (ordering reinstatement and make-whole relief for unnamed unit employees who had been discharged and/or suffered loss of earnings and other benefits as the result of respondent's unlawful unilateral changes).

The General Counsel further requests that I order that employees be reimbursed for "consequential economic harm" incurred by them as a result of Respondent's unlawful conduct. (GC Br. 66-72) However, the Board does not traditionally provide remedies for consequential economic harm in its make-whole orders. See, e.g., *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). While the General Counsel acknowledges that the Board typically does not include such a remedy, he nevertheless urges that if said employees are unable to pay their mortgage or car payments as a result of the unlawful discrimination against them, they should be compensated for the "economic consequences that flow from the inability to make payment[s]," such as late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car. (GC Br. 69.) I am, of course, obligated to follow existing Board precedent in resolving the issues present in this case. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I deny the General Counsel's request for these additional remedies.

Finally, the Respondent shall be ordered to recognize and bargain with the Union, and provide the Union with the information it requested on March 29 and July 1, 2016. As part of the remedy, the Respondent shall be ordered to recognize and bargain with the Union for the period of time required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the exclusive collective-bargaining representative of the appropriate bargaining unit. The Board has long held that an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of its opportunity to bargain during the time of the union's greatest strength. *Santa Barbara News-press*, 358 NLRB 1415, 1417 (2012); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004); *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), *enfd.* 939 F.2d 402 (6th Cir. 1991). In these circumstances, the Board extends the certification year in order to ensure at least one year of good-faith bargaining. *Santa Barbara News-press*, *supra*. In this case, the Respondent's unfair labor practices have intervened and prevented the employees' certified bargaining representative from enjoying a free period of a year after certification to establish a bargaining relationship, and it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices. The Respondent has also refused to recognize and bargain with the Union even after the Board's Order approximately 1 year ago requiring it to recognize and bargain with the Union.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:<sup>24</sup>

# ORDER

The Respondent, Spectrum Juvenile Justice Services, Highland Park, Michigan, its officers, agents, and representatives, shall

## 1. Cease and desist from

- (a) Engaging in the following conduct: (1) unlawfully interrogating employees regarding their engagement in, sympathy for, or support of protected concerted activities; (2) engaging in surveillance of employees' protected concerted activities; (3) unlawfully interrogating employees about their union sympathies, membership, or support; (4) threatening employees with discipline, including discharge, for engaging in protected concerted activities; (5) creating the impression that employees' protected concerted activities are under surveillance; and (6) coercively informing employees that breaks would no longer be allowed because they chose or voted for the Union as their collective-bargaining representative.
- (b) Suspending, discharging, disciplining or otherwise discriminating against employees because they engage in protected concerted activities, such as bringing complaints or concerns about their working conditions to the Respondent on behalf of themselves and other employees.
- (c) Discriminatorily and/or unilaterally eliminating breaks and requiring part-time contingent employees to work mandated overtime shifts, without bargaining with the Union or providing the Union an opportunity to bargain over such changes in employees' terms and conditions of employment.
- (d) Discharging employees as a result of their inability to comply with unlawful unilateral changes requiring part-time contingent employees to work mandated overtime shifts, or any other unilateral changes to employees' terms and conditions of employment.
- (e) Failing and refusing, upon request, to recognize and bargain collectively with the International Union, Security, Police and Fire Professionals of America (SPFPA Union), the certified collective-bargaining representative of the employees in the following bargaining unit, and by failing and refusing to furnish it with requested information in a timely manner that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit:

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<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and part-time armed and unarmed security officers, including direct care and youth workers performing guard duties as defined in Section 9(b)(3) of the Act, employed by the Employer at its facilities located at 300 Glendale and 1961 Lincoln, Highland Park, Michigan, but excluding, all office clerical employees, professional employees and supervisors as defined by the Act.

(f) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days of this Order, rescind the policy/practice of requiring part-time contingent employees to work mandated overtime shifts, and reinstate the policy/practice of providing breaks between employees' scheduled and mandated overtime shifts.

(b) Upon request, recognize and bargain in good faith with the SPFPA Union for a period of time required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), and furnish the Union, in a timely manner, with the information it requested on March 29 and July 1, 2016, that is relevant to, and necessary for, its duties as the collective-bargaining representative of the bargaining unit employees.

(c) Within 14 days from the date of the Board's Order, offer Alfred Neely and Lamont Simpson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, offer Quiana Jenkins, and all other contingent employees who were discharged, suspended, or disciplined for failing to comply with the unlawful and unilaterally imposed requirement that they work mandated overtime shifts, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole Sherman Cochran, Tamika Kelley, Delaine Singleton-Green, Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who were suspended or discharged for failing to comply with the unlawful and unilaterally imposed requirement that they work mandated overtime shifts, for any loss of earnings and other benefits suffered as a result of their unlawful disciplines, suspensions, or discharges, less any net interim earnings, plus interest, including any search-for-work and interim employment expenses they incurred, in the manner set forth in the remedy section of this decision.

(f) Compensate Sherman Cochran, Tamika Kelley, Delaine Singleton-Green, Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who were suspended or discharged for failing to comply with the unlawful and unilaterally

imposed requirement that they work mandated overtime shifts, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amounts of backpay are fixed, either by agreement or Board order, reports allocating the backpay awards to the appropriate calendar years for those employees.

- (g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of Sherman Cochran, Tamika Kelley, and Delaine Singleton-Green; the unlawful discharges of Alfred Neely and Lamont Simpson; the unlawful discipline in the form of a written reprimand issued to Tamika Kelley on September 24, 2015, for her failure to call-off for her scheduled shifts on September 22 and 23, 2015; and the unlawful discharge of Quiana Jenkins, and all other contingent employees who were disciplined, suspended or discharged for failing to comply with the unlawful and unilaterally imposed requirement that they work mandated overtime shifts, and within 3 days thereafter, notify said employees in writing that this has been done and that the suspensions, discharges, and discipline will not be used against them in any way.
- (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.
- (i) Within 14 days after service by the Region, post at its facility in Highland Park, Michigan, copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2015.

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<sup>25</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



- (j) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. October 11, 2017



Thomas M. Randazzo  
U. S. Administrative Law Judge

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## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** unlawfully interrogate you about your engagement in, sympathy for, or support of union or protected, concerted union activities, including bring complaints or concerns about your working conditions to us on behalf of yourselves or other employees.

**WE WILL NOT** engage in surveillance of your protected, concerted activities.

**WE WILL NOT** unlawfully interrogate you about your union sympathies, membership, or support.

**WE WILL NOT** threaten you with discipline, including discharge, for engaging in protected, concerted activities.

**WE WILL NOT** create the impression that your engagement in protected, concerted activities are under surveillance.

**WE WILL NOT** coercively inform you that you will no longer be allowed breaks because you chose or voted for the Union as your collective-bargaining representative.

**WE WILL NOT** suspend, discharge, discipline, or otherwise discriminate against you for engaging in protected concerted activities, such as bringing complaints or concerns about your working conditions to us on behalf of yourselves and other employees.

**WE WILL NOT** discriminatorily and/or unilaterally eliminate breaks or require part-time contingent employees to work mandated overtime shifts, without bargaining with the Union or providing the Union an opportunity to bargain over those changes in your terms and conditions of employment.

**WE WILL NOT**, as a result of our unlawful unilateral change requiring part-time contingent employees to work mandated overtime shifts, suspend or discharge you because you were unable to work those mandated shifts as directed.

**WE WILL NOT**, upon request, refuse to recognize and bargain in good faith with the SPFPA Union or fail and refuse to provide the Union with information it requested that is relevant to, and necessary for, its duties as the collective-bargaining representative of our bargaining unit employees.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

**WE WILL**, within 14 days from the date of the Board's Order, rescind the policy/practice of requiring part-time contingent employees to work mandated overtime shifts, and **WE WILL** reinstate the policy/practice of providing breaks between employees' scheduled and mandated overtime shifts.

**WE WILL**, upon request, recognize and bargain in good faith with the SPFPA Union for a period of time required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), and **WE WILL** furnish the SPFPA Union, in a timely manner, with the information it requested on March 29 and July 1, 2016, that is relevant to, and necessary for, its duties as the collective-bargaining representative of the bargaining unit employees.

**WE WILL**, within 14 days from the date of the Board's Order, offer Alfred Neely and Lamont Simpson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL**, within 14 days from the date of the Board's Order, offer Quiana Jenkins and all other part-time contingent employees who we discharged for failing to comply with our unlawful and unilaterally imposed requirement that they work mandated overtime shifts, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL** make Sherman Cochran, Tamika Kelley, Delaine Singleton-Green, Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who we suspended or discharged for failing to comply with our unlawful and unilaterally imposed requirement that they work mandated overtime shifts, whole for any loss of earnings and other benefits resulting from their unlawful suspensions or discharges, less any net interim earnings, plus interest, including any search-for-work and interim employment expenses they incurred as a result of the unlawful suspensions or discharges.

**WE WILL** compensate Sherman Cochran, Tamika Kelley, Delaine Singleton-Green, Alfred Neely, Lamont Simpson, Quiana Jenkins, and all other contingent employees who we suspended or discharged for failing to comply with our unlawful and unilaterally imposed requirement that they work mandated overtime shifts, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file with the Regional Director for Region 7, within 21

